
IN THE
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United States Circuit Court
of Appeals
for the
NINTH CIRCUIT

May Session, 1918

Koke Company of America,
Southern Koke Company, L'td.,
Koke Company of Texas,
Koke Company of Arkansas,
and Koke Company of Oklahoma,
Appellants.

vs.

The Coca-Cola Company,
Appellee.

No. 3012
Arizona
Equity

Brief on Behalf of the Appellants.

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STATEMENT OF THE CASE

This is a suit for an injunction against alleged trademark infringement and unfair competition, and for an accounting of damages and profits. The case is here on appeal by the Koke Company of America, the Southern Koke Company, Limited, the Koke Company of Texas, the Koke Company of Arkansas, and the Koke Company of Oklahoma, the defendants below, from an interlocutory decree of the U. S. District Court for the District of Arizona, granting the Coca-Cola Company,

the plaintiff below, the injunctive relief sought in substantially the form as prayed, awarding a reference for an accounting of both damages and profits, and adjudging all the costs of the cause against the defendants.

Plaintiff is a Georgia corporation engaged in the manufacture and sale of a syrup for making a carbonated beverage, to which it applies the name "Coca-Cola." The defendant, Koke Company of America, is an Arizona corporation and manufactures in St. Louis, Missouri, an extract to be used as a base for making a syrup like plaintiff's syrup, to which it applies the names "Koke" and "Dope." The Southern Koke Company, Limited, and the Koke Company of Texas are also Arizona corporations, the former having its plant at New Orleans, La., and the latter at Dallas, Texas. The Koke Company of America ships its extract to these defendants, who manufacture it into a syrup like plaintiff's syrup and sell it under the names "Koke" and "Dope" to soda fountains and to bottlers to be made by the latter into a carbonated beverage like that made from plaintiff's syrup. There are no such concerns as the Koke Company of Oklahoma and the Koke Company of Arkansas. Charters were taken out for them under the laws of Arizona, but nothing further was ever done, and their charters were abandoned long before this suit was brought.

(1) THE PLEADINGS.—a. THE ORIGINAL BILL.

It was alleged in the original bill (Rec., 1-18) that, prior to the year 1886, a Dr. J. S. Pemberton, of At-

lanta, Georgia, began to make, "according to a secret formula which is now the sole property of the plaintiff," a syrup for the manufacture of a "refreshing non-alcoholic beverage," and that he applied the name "Coca-Cola" thereto as a trade-mark therefor, and registered it in the Patent Office on June 6th., 1887, under the provisions of the Trade-Mark Act of March 3rd., 1881; that on July 8th., 1887, he sold a two-thirds interest in said business to "one Lowndes and one Venable;" that on December 14th., 1887, said Lowndes and Venable assigned their alleged two-thirds interest therein to "one Walker and Dozier;" that on April 14th., 1888, J. S. Pemberton transferred all of his remaining interest therein to Walker, Candler & Company, a co-partnership composed of Woolfolk, Walker, Asa G. Candler and Joseph Jacobs; that on April 17th., 1888, Walker and Dozier assigned one-half of their alleged two-thirds interest to Asa G. Candler, and, on August 30th., 1888, conveyed to him all of their alleged remaining interest; that on April 22nd., 1891, Walker, Candler & Company assigned all their alleged interest to Asa G. Candler; that on February 22nd., 1892, Asa G. Candler transferred all of his alleged interest to the Coca-Cola Company, the present plaintiff; and that plaintiff has since continuously, down to the present time, manufactured said syrup in accordance with said alleged secret formula, and marketed it under the name "Coca-Cola."

It was further alleged that on October 31st., 1905, plaintiff registered the words "Coca-Cola" in the Patent Office as a trade-mark for its product under the Ten

Year Clause of Sec. 5 of the Trade-Mark Act of Feb. 20th., 1905, and that, by virtue of its long use of said words as a trade-mark, and said registrations, it is the owner of a technical trade-mark in the words "Coca-Cola" and entitled to their exclusive use.

It was further alleged that plaintiff prints the words "Coca-Cola" in a distinctive style of type; that it colors its syrup a distinctive color, alleged to be arbitrary, unusual and unnecessary, for the purpose of distinguishing it from the similar products of others, and markets it in barrels painted a distinctive shade of red, and in dispensing bottles having a distinctive size, color and shape; that the bottlers to whom plaintiff sells its syrup market the beverage which they make therefrom in bottles having a distinctive size, shape and color, with distinctive labels and crowns, and that on all of said receptacles plaintiff applies labels bearing its alleged trade-mark "Coca-Cola," printed in the alleged distinctive style of type above referred to, and, in addition, prints its alleged trade-mark in said style of type in its advertisements, and on its stationery, price lists and circulars, and on small signs furnished to dealers and advertisers.

It was then alleged that defendants are infringing plaintiff's alleged trade-mark "Coca-Cola" by the use of the word "Koke," printed in a style of type alleged to deceptively resemble that in which plaintiff prints the words "Coca-Cola;" that defendants unnecessarily make their syrup like plaintiff's syrup in color, and market it in barrels painted a deceptively similar shade of red, and in dispensing bottles deceptively similar to plaintiff's

dispensing bottles in size, shape and color, and that the bottlers to whom the defendants sell their syrup market the beverage made therefrom in bottles deceptively resembling plaintiff's bottles in size, color and shape, having thereon labels and crowns, supplied by defendants, alleged to deceptively resemble the labels and crowns supplied by plaintiff to the bottlers of its product.

It was further alleged that the Koke Company of America did not adopt or use the word "Koke" until many years after plaintiff's product, under the name "Coca-Cola," had become widely and favorably known; that said word "Koke" was adopted by said defendant, and is being used by it and the other defendants, for the purpose only of infringing plaintiff's alleged trademark "Coca-Cola" and of enabling defendants' goods to be palmed off on the public as and for plaintiff's; and that defendants have imitated the color of plaintiff's syrup and of its barrels, the size, shape and color of its bottles and dispensing bottles, and the general features of its labels and crowns, in order to enable their product to be more readily passed off as and for plaintiff's.

It was further alleged that defendants state to the dealers to whom they sell their syrup that it is made under the same syrup formula as "Coca-Cola," and by one who is acquainted therewith, and who, at one time, had an interest therein, which statements were alleged to be false; that defendants advise and instruct those to whom they sell their syrup to pass off the beverage made therefrom as and for the beverage made from plaintiff's syrup, and that said dealers follow said instructions,

and thus deprive plaintiff of that trade which its industry and money have built up.

The bill prayed for an injunction to restrain defendants from "using or employing, in connection with the manufacture, advertisement, offering for sale, or sale of any product not being the genuine product of the plaintiff, the word 'Coca-Cola,' or any like word, or the word 'Koke,' or any like word, or any word or name which, in sound, appearance, or suggestion, is identical with, or like, the word 'Coca-Cola' of the plaintiff, or the word 'Koke;' from using or employing, or from authorizing the use or employment of, labels, designs or devices identical with, or like, the labels, designs or devices of the plaintiff, or the labels, designs or devices now used by the defendants; from using, in connection with the sale or shipment of any product not the plaintiff's, barrels or receptacles colored in imitation of plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by the defendants, or any of them, is made from the same formula as 'Coca-Cola' syrup, or that defendants, or any of them, may rightfully use or employ the 'Coca-Cola' formula; from coloring, or otherwise contriving, any product not the plaintiff's, in such a way as to be calculated to induce the belief that the same is the plaintiff's; and, further, from doing any act or thing, or using any name or names, devices, artifices, or contrivances, which may be calculated to represent that any product not of plaintiff's production is the genuine 'Coca-Cola' of plaintiff." (Rec., 16-17).

The bill also prayed for an accounting of damages and profits. (Rec., 17)

b. THE ANSWER.

The defendants answered (Rec., 27-84), denying that the word "Koke" infringes the words "Coca-Cola" as a trade-mark, and denying that the style of type in which it is printed deceptively resembles that in which plaintiff prints the words "Coca-Cola." They admitted that their syrup has the same color as plaintiff's syrup, and that it is marketed in receptacles having the same size, color, and shape as plaintiff's receptacles, but they denied that either the style of type in which plaintiff prints the words "Coca-Cola," or the color of plaintiff's syrup, or the size, color, or shape of the receptacles in which it or its dealers market it, or the beverage made therefrom, or all combined, is, or are, distinctive, averring that these features of plaintiff's goods and packages are, both singly and in combination, old in the art and common to the trade. They denied that their crowns deceptively resemble plaintiff's, or that any of their labels in any wise resembles plaintiff's labels. They averred that the only label ever used by the defendants, or their dealers, which ever offered the slightest basis for a charge of deceptive similarity, was a blue bottle label which some of defendants' dealers used for about six months, but the use of which they voluntarily discontinued at the suggestion of defendants many months before this suit was brought. It was averred that even said label was not so deceptively similar to plaintiff's label as to be likely to deceive purchasers, and that it had not, in fact, deceived any one.

They denied that they use the word "Koke" in the

style of type in which it is printed, or that they color their syrup like plaintiff's and market it in the receptacles referred to for the purpose of enabling the beverage made from their syrup to be passed off by dealers as and for plaintiff's beverage; denied that they advise or instruct dealers to so pass it off, or that they connive at, or countenance, any such fraudulent practices; and denied that their dealers do, in fact, substitute it for plaintiff's product.

'They averred that the color of their syrup is not an arbitrary, fanciful feature of dress merely, but that it is an indispensable structural feature of the article and a physical requirement essential to commercial success, and that they give their syrup the color it has for that reason, and not for the purpose of enabling it to be passed off as and for plaintiff's product. 'They averred that it would be as futile to attempt to market a product of that character having a different color, as it would be to attempt to market root beer having a green color, or creme de menthe colored black, or strawberry soda colored blue. 'They further averred that the paint they use for painting their barrels and kegs is a cheap mineral paint made from red clay found in abundance in Georgia and Alabama; that this paint produces only one color, namely, the color of the clay from which it is made; that said paint dries several hours quicker than the chemical paints, requires only one coat where the chemical paints require two or more, and is considerably cheaper than any other kind of paint because of the cheapness and abundance of the materials from which it is made; that

for these reasons this paint has been used since time immemorial as a standard paint for painting barrels and kegs, and that defendants use it for these reasons. They further averred that the beverage made from their syrup is not served to the public from barrels, and that consumers do not see the barrels at the time of their purchase, and hence that the color of the barrels could in no wise aid in the passing off of the beverage made from their syrup as and for the beverage made from plaintiff's. They further averred that the dispensing bottle which they use and supply to retail dealers as a receptacle for their syrup is a standard stock dispensing bottle manufactured and carried in stock by all manufacturers of and dealers in such articles, and sold indiscriminately to the trade; that the design used by the defendants is a machine made design produced in enormous quantities for general distribution, and for that reason is considerably cheaper than the hand-made designs made for particular concerns, and that defendants use, and furnish their dealers with, bottles of that character solely because of their cheapness.

They denied that they state to dealers that their syrup is made under the same syrup formula as plaintiff's present product, or by one who is acquainted therewith, but they admitted that they sometimes state to their dealers that their syrup is made by one who is acquainted with the formula which Dr. Pemberton got up for the syrup to which he applied the name "Coca-Cola," and who was, at one time, interested therein, and they averred that said statements are true.

They denied that defendants adopted the word "Koke" many years after plaintiff's product, under the name "Coca-Cola," had become widely and favorably known, and denied the validity of plaintiff's alleged chain of title to the word "Coca-Cola." They averred that on January 14th., 1888, Dr. J. S. Pemberton conveyed his entire business, consisting of the manufacture and sale of "Pemberton's French Wine of Coca," "Globe Flower Cough Syrup," "Indian Queen Hair Dye," "Coca-Cola Syrup," "Gingerine," "Compound Extract of Styllingia," "Lemon & Orange Elixir," and a number of other remedies, together with the good-will thereof, and all labels, formulas, trade-marks and trade-names used therein, to the Pemberton Medicine Company, a partnership composed of J. S. Pemberton, A. O. Murphy, E. H. Bloodworth and J. C. Mayfield; that said Pemberton Medicine Company manufactured and sold all of said remedies, including the "Coca-Cola" remedy, and sold the latter under the name "Coca-Cola," until about the first of April, 1888, when it adopted, as a trade-mark name for said "Coca-Cola" remedy, the word "Koke;" that thereafter it used the word "Koke" as the trade-mark name of said product, and from that time on, sold it under that name; that on June 6th., 1888, Murphy retired from the partnership, transferring to the remaining partners all his interest in the partnership business; that about the middle of July, 1888, J. S. Pemberton died, whereupon a settlement was made with his widow and heirs, by the terms of which Mayfield and Bloodworth, as the surviving partners, retained the "Wine of Coca" and the "Koke" business; that in 1893

they sold the "Wine of Coca" business to other parties; that in 1895 Bloodworth transferred all of his interest in the "Koke" business to J. C. Mayfield; that thereafter J. C. Mayfield, individually, continuously manufactured and sold said "Koke" syrup in receptacles labelled with the name "Koke" until about Sept. 15th., 1911, when he transferred all of his interest in said business to the defendant, Koke Company of America; and that the Koke Company of America has since been manufacturing and selling said product in receptacles labelled with the name "Koke."

They further averred that on December 27th., 1898, W. L. Bitting, of Sherman, Texas, registered in the Patent Office, under the Copyright Act of June 18th., 1874, a label entitled and bearing the name "Koke" in block letters, which he continuously used on the receptacles containing an extract, syrup, and beverage similar in all respects to plaintiff's and defendants' products, until the 21st. of October, 1913; that on August 21st., 1911, he filed an application in the Patent Office for the registration of the word "Koke" as a trade-mark for his said product; that on the 21st. of October, 1913, he assigned all his interest in said business, and in the registered label referred to, and in the word "Koke," to the Koke Company of America; that the assignment was duly recorded in the Patent Office October 28th., 1913; and that on January 13th., 1914, the Patent Office allowed the registration of said word "Koke" as a trade-mark for said extract, syrup and beverage, and granted a certificate of such registration to the Koke Company

of America, as the assignee of said Bitting. A copy of said certificate was attached to the answers as exhibit "C."

They further averred that the Murfreesboro Bottling Works, a Tennessee corporation, began to use the word "Koke," in the same style type as that in which the defendants now use it, as a trade-mark for an extract, syrup, and beverage similar in all respects to plaintiff's and defendants' products, on or about May 1st., 1902, and registered the same in the Patent Office as a trade-mark for its said product August 21st., 1906, a copy of the certificate of such registration being attached to the answer as exhibit "D"; that thereafter said corporation was dissolved, and S. B. Christy, C. H. Huggins, J. W. Huggins, and Christy & Huggins, a partnership composed of the said Christy and of the said two Huggins' (who were the owners of all the capital stock of said corporation) succeeded to the business and trade rights of the Murfreesboro Bottling Works; that on November 28th., 1911, said parties transferred said business, and the good-will thereof, together with the trade-mark "Koke" and the registration thereof in the Patent Office, to the defendant, Koke Company of America, by an instrument in writing which was duly recorded in the Patent Office December 12th., 1911; and that on said date a certificate evidencing such assignment was issued to the Koke Company of America by the Commissioner of Patents. A copy of said certificate was attached to the answer as exhibit "E."

They then averred that the words "Coca-Cola" are not

a valid trade-mark of the plaintiff, because they are descriptive, and because plaintiff did not have the exclusive use of them during any portion of the ten years next preceding the passage of the Trade-Mark Act of February 20th., 1905.

They further averred that plaintiff comes into court with unclean hands, because, by using the name "Coca-Cola," and the pictures of coca leaves and cola nuts which it displays on its labels, it is deceiving and misleading the public as to the composition and ingredients of its product.

They further averred that the use of the words "Coca-Cola," as applied to the plaintiff's product, constitutes a misbranding thereof under Sec. 8 of the Food & Drugs Act of June 30th., 1906, for the reason that it misleads and deceives the public as to the composition and ingredients of plaintiff's product. They further averred that plaintiff's product is misbranded under Sec. 8 of the Food & Drugs Act: (a) because plaintiff sells its product under the name "Coca-Cola," which is the distinctive name of a compound or mixture of the drugs coca and cola, whereas plaintiff's product is not a compound of that character, and, hence, is sold under the distinctive name of another article; (b) because plaintiff sells its product under the name "Coca-Cola," which is the name Dr. Pemberton gave to the alleged secret proprietary compound he is alleged to have invented and which plaintiff claims to have manufactured and sold under that name for many years, whereas plaintiff's product is not that article, and, hence, is sold under the

distinctive name of another article; (c) because plaintiff labels the receptacles containing its product with the words "Coca-Cola," and with pictures of coca leaves and cola nuts, which words constitute a statement, and which picture constitute a design or device representing, that plaintiff's product is essentially composed of the drugs coca and cola, when in fact it is not, and, hence, that plaintiff brands and labels its product so as to mislead and deceive purchasers, and attaches labels to the receptacles containing it which bear both a statement and a design or device regarding said product, and the ingredients or substances contained therein, which are false and misleading.

They further averred that plaintiff's product is adulterated under Sec. 7 of the Food & Drugs Act, because substantial and valuable constituents of said product, to-wit: the drugs coca and cola, and the characteristic properties thereof, have been wholly or in part abstracted from plaintiff's said product.

Defendants pleaded Sec. 21 of the Trade-Mark Act of February 20th., 1905, in bar of all relief under said Act, and of all relief predicated upon the theory that the words "Coca-Cola" are a trade-mark, averring that said words are, as applied to the plaintiff's product, deceptive and misleading, and are used with the design of deceiving the public in the purchase of merchandise, and that they are used by plaintiff upon an article which is misbranded and adulterated in violation of the Food & Drugs Act, and, therefore, in an unlawful business.

Defendants denied that plaintiff has suffered any actionable damage at their hands, or that it is entitled to any profits they may have derived from their business, and averred that they and their predecessors in title have, for more than a quarter of a century, with the knowledge and acquiescence of the plaintiff, manufactured their said syrup, and sold it under the name "Koke," in receptacles having the same characteristics as those they now use, and that, therefore, plaintiff is estopped and barred by its laches from the recovery of damages or profits.

c.—AMENDMENTS TO ORIGINAL BILL.

After plaintiff had taken all of its testimony in chief, and after defendants had begun to make their testimony, plaintiff applied for leave to amend its bill (Rec., 112):

1.—By striking out all allegations to the effect that the words "Koke" infringes the words "Coca-Cola" as a trade-mark, and by substituting in lieu thereof allegations to the effect that, "in addition to the name 'Coca-Cola,' which has been used generally by purchasers who desire plaintiff's product, there are also used and employed certain nick-names by which plaintiff's product is known, asked for, and identified by purchasers and consumers thereof; that one of said nick-names is the word 'Koke,' into which plaintiff's trade-mark 'Coca-Cola' has been abbreviated by the public, and that another of said nick-names is the word 'Dope,' and that each of said words is now, and for many years past has been, and prior to the application of either of them

to any other beverage, recognized and commonly and familiarly used nick-names for plaintiff's beverage, so that a request at a soda fountain, or wherever beverages are on sale, for 'Koke' or 'Dope' is understood to be a specific and definite request for 'Coca-Cola,' so understood by the purchaser using such word and so understood by the dealer, and for very many years, and continuously to the present time, and before the application of either of said words to any other beverage whatever," each of them "indicated, designated and identified," and now indicates, designates and identifies "plaintiff's said product, and means it and nothing else;" that the defendant, Koke Company of America, adopted the words "Koke" and "Dope" many years after plaintiff's product had become widely and favorably known, not only under the name "Coca-Cola," but under said alleged nick-names, and that it adopted said words, and that it and the other defendants herein are now using them, for the purpose only of enabling dealers in their product to pass off the beverage made therefrom as and for plaintiff's beverage; that defendants state to dealers that their syrup sold under the names "Koke" and "Dope" is made from the same syrup formula as plaintiff's syrup, and by one who is acquainted therewith, and and who was at one time interested therein, and that said statements are false; that defendants advise and instruct dealers in their product to pass it off on purchasers who ask for plaintiff's product either by the name "Coca-Cola," or by some one or more of the alleged nick-names therefor, and that said dealers follow said instructions.

2.—By striking out the allegation to the effect that

Dr. Pemberton registered the words "Coca-Cola" as a trade-mark in 1887, and by substituting in lieu thereof an allegation to the effect that plaintiff registered said words as a trade-mark on January 31st., 1893, under the provisions of the Trade-Mark Act of March 3, 1881.

3.—By adding a new paragraph alleging that the defendant, Koke Company of America, claims to have secured, and now to own, certain registrations in the Patent Office of the words "Koke" and "Dope;" that said registrations were secured in fraud of plaintiff's rights; that the Koke Company of America, the other defendants herein, and their emmisaries, threaten dealers in plaintiff's product who dispense it in response to requests for "Koke" and "Dope," with prosecution, claiming the words "Koke" and "Dope" to be the registered trade-marks of the Koke Company of America, and claiming that the sale of any beverage other than defendants' on calls for "Koke" and "Dope" is an infringement of the rights of the Koke Company of America and of said registrations, and a violation of the Federal laws; and that said threats are made for the sole purpose of harassing persons selling plaintiff's product, and of damaging and embarrassing plaintiff in its business.

4.—By striking out the prayer for an injunction, and substituting in lieu thereof a prayer for an injunction to restrain defendants from "using or employing, in connection with the manufacture, advertisement, offering for sale or sale of any product not being the genuine product of the plaintiff, the word 'Coca-Cola,' or any like word, or the word 'Koke,' or any like word, or the word

'Dope,' or any like word, or any name or nick-name by which plaintiff's product is commonly known; from claiming or asserting any right in the name 'Koke' or in the name 'Dope,' or interfering, or threatening any prosecution, or interference with the use thereof as short names or nick-names of plaintiff's product." (Rec., 113-123.)

Plaintiff sought leave to make said amendments under the pretense that it was surprised by the testimony of its own witnesses, that their testimony was different from what plaintiff supposed it would be, and that plaintiff desired to make said amendments merely to have the pleadings conform to the proof.

The defendants resisted the application (Rec., 130): (a) because the amendments changed the cause of action from one for the infringement of a trade-mark to one for unfair competition pure and simple, was a radical departure from the theory of the case as presented in the original bill, necessitated a different line of defense, and required a new and extensive investigation into the facts, and the production of evidence different in character and volume from that called for under the issues raised by the original bill; (b) because they worked a hardship and an injustice on defendants for the reason that, at the time plaintiff took its testimony in chief, counsel for defendants were not prepared to intelligently cross-examine plaintiff's witnesses as to the facts relating to the new issues introduced by said amendments; and (c) because no good and sufficient reason was shown for making said amendments at the time they were sought, for the reason that the testimony

theretofore taken by plaintiff showed that plaintiff and its counsel had had in their possession, for a year or more before the suit was brought, detailed statements in writing of all the testimony their witnesses would give on the very points as to which plaintiff claimed it was surprised, and that said written statements not only coincided with the testimony which said witnesses actually gave, but, in many instances, were read into the record verbatim as their testimony.

The district court granted leave to make said amendments (Rec., 153), to which action the defendants excepted and which action they assigned as error and as an abuse of discretion. [XVIII Assignment of Error (Rec., 270).]

d.—ANSWER TO AMENDED BILL.

Defendants then answered the amended bill denying that the registration of the words "Coca-Cola" by plaintiff on January 31st., 1893, was valid for the reason that before, at the time of, and ever since, said registration, said words were and have been descriptive and generic. They also denied the averments to the effect that "Koke" is an abbreviation of the words "Coca-Cola," and that it and the word "Dope" are nick-names for plaintiff's product. They averred that plaintiff has never at any time used or employed either of said words in any manner, for any purpose, or authorized or countenanced their use, but that, on the contrary, plaintiff has habitually repudiated them as any sort of designation of its product, and informed the public, through its advertis-

ing and otherwise, that said words do not in any manner indicate its product.

They denied that they adopted, or are now using, either the word "Koke" or the word "Dope" for the purpose of taking any unfair advantage of plaintiff, or to enable their product to be substituted for plaintiff's product; denied that the use of said words by them enables their dealers to pass off their product for plaintiff's; denied that they make the statements to dealers alleged in the amended bill, or that they advise or instruct dealers in their product to substitute it for plaintiff's when plaintiff's product is asked for; and denied that dealers in their product do in fact, pass it off as plaintiff's product. They further denied that the sale of their product in response to requests for either "Koke" or "Dope" constitutes a sale thereof as or for plaintiff's product.

They then set up their chain of title to the word "Dope" as follows: About the year 1903 P. L. Houppert and Samuel H. Worcester, of Birmingham, Ala., partners doing business as "Houppert & Worcester," began to make, and to sell in interstate commerce, an extract, syrup, and beverage substantially identical with that which defendants manufacture and sell under the name "Dope," and applied thereto the name "Dope." On May 11th., 1905, they applied to the Patent Office for registration of the word "Dope," as a trade-mark for said product. Pending said application, and on June 6th., 1905, Worcester assigned all his interest in said business and good-will, and in the mark "Dope," to Houpp-

pert, which assignment was made in writing and recorded in the Patent Office June 6th., 1905. Thereafter Houppert formed a partnership with E. J. Smyly, of Birmingham, and conveyed to him a one-half interest in said business and good-will, and in the mark "Dope." On June 4th., 1907, the application previously made to the Patent Office by Houppert & Worcester was allowed, and a certificate of registration of the word "Dope" was duly granted. A copy of said certificate was attached to the amended answer as exhibit "A-1." Thereupon Houppert & Smyly transferred all their rights to the National Dope Company, an Alabama corporation, which later changed its name to the Birmingham Bottling Company. About May 6th., 1913, the Birmingham Bottling Company assigned all its interest to S. T. Mayfield and J. C. Mayfield, and shortly thereafter Frank Campbell and A. E. Seiner, as administrators of the estate of P. L. Houppert, who had died in the meantime, assigned to said Mayfields such interest as may have remained in the estate of the said Houppert. On December 26th., 1913, said Mayfields transferred all their interest to the defendant, Koke Company of America, which has since then, down to the present time, continuously manufactured said product and sold the same under the name "Dope" in receptacles labelled with that name.

Defendants denied that the registrations which they had obtained of the words "Koke" and "Dope" were in fraud of any rights of the plaintiff. They admitted that they had printed on their stationery, and on the cards of their traveling salesmen, a notice to the effect that

the Koke Company of America was the owner of said registrations, and that any infringement thereof would subject those guilty of such infringement to prosecution therefor, but they denied that they printed or circulated said warning for the purpose of harrassing persons selling plaintiff's product, or of damaging or embarrassing plaintiff in its business. They averred that the only purpose they had in printing said notice was to warn the trade of what they, in good faith, believed to be their rights, and to aid them in protecting such rights from unlawful invasion. They further averred that it does not lie in the mouth of plaintiff to complain of their action in so doing, because plaintiff, itself, has, by every means in its power, endeavored to obtain a monopoly, not only of the words "Koke" and "Dope," but of the **entire vocabulary** by which the kind of commodity it makes is usually asked for, and has not only harrassed and annoyed those dealing in defendants' product by threats of prosecution, but has actually brought numerous malicious and vexatious suits against them for alleged infringements of plaintiff's alleged rights, for the sole purpose of damaging and embarrassing defendants in their business and of driving them from the field of competition; that it has, by threats and intimidation, coerced numerous dealers in defendants' product into signing contracts with it agreeing, in violation of Sec. 3 of the Act of Oct. 15th., 1914, commonly known as the Clayton Anti-Trust Act, not to handle in the future any product similar to its own but that of its manufacture, and not to sell or dispense, in response to calls for "coke," or "dope," or any of the numerous other slang

expressions used by the public in asking for that character of beverage, any beverage of that kind except that manufactured by it; and that it has, in divers other ways, which are set out in the amended answer, endeavored to destroy defendants' business, and has very nearly succeeded in doing so.

They further averred that plaintiff is engaged in an unlawful business for the reason that its business consists in the making of sales, and of contracts for the sale of, its product, in interstate commerce, for use, consumption, and resale within the United States; that said sales and contracts of sale are constantly and habitually made upon the condition, agreement and understanding that the purchasers of its said product will not buy, handle, use or deal in the products of any of plaintiff's competitors; that in the regular course of its business, plaintiff fixes the price of its product, and discounts from, and rebates upon, such prices, upon the condition, agreement, and understanding that purchasers thereof will not buy, handle, use, sell, or deal in the products of any of its competitors; that the effect of such sales and contracts of sales, and of such conditions, agreements and understandings, and of the fixing of the price charged for its product, and of the discounts from, and rebates upon, such price, upon the condition, agreement and understanding aforesaid, is to substantially lessen competition, and to tend to create a monopoly of the commodity plaintiff manufactures, in trade and commerce among the several states, all of which is a direct violation of the express provisions of Section 3 of the Clayton Anti-Trust Act.

(2).—THE DECREE.

The District Court decreed that the words "Coca-Cola" are a valid trade-mark; that the words "Koke" and "Dope" are each an abbreviation of the words "Coca-Cola" and an infringement thereof; that they are used by the public and by purchasers in designating plaintiff's product, and that they were adopted by the defendants and their predecessors for the deliberate purpose of representing their goods to be the product manufactured by plaintiff; that the Koke Company of America and its predecessors in title did not adopt or use the word "Koke" until the year 1909, and that they have no right to its use; that defendants and their predecessors have no interest in or claim to the alleged trade-mark "Coca-Cola," or the "Coca-Cola" business or formula; that their claim of interest in the "Coca-Cola" business and alleged trade-mark, and of knowledge of the "Coca-Cola" formula, are without foundation; and that defendants, and each of them, have infringed plaintiff's alleged trade-mark, and have been guilty of unfair competition with plaintiff; and, accordingly, granted the injunction prayed for in the amended bill, awarded plaintiff a reference for an accounting of both damages and profits, and adjudged all the costs of the cause against the defendants. (Rec., 242-245)

Within thirty days of the entry of said decree, the defendants appealed (Rec., 249 and 289) and assigned errors. (Rec., 250-288)

While the assignments of error are numerous and

lengthy, and will be found in the record at pages 250 to 288, the errors pointed out thereby may be succinctly stated as follows:

SPECIFICATIONS OF ERROR.

The District Court erred in the following respects:

I.

(1)—In failing to find that plaintiff comes into court with unclean hands because it is misleading and deceiving the public with respect to the composition and ingredients of its product, through the use on its labels of the falsely descriptive words "Coca-Cola," and of deceptive pictures of coca leaves and cola nuts.

(2)—In failing to dismiss the bill for that reason.

II.

(1)—In failing to find that plaintiff's product is misbranded under Sec. 8 of the Food & Drugs Act, because:

(a) Plaintiff labels and brands its product with the falsely descriptive words "Coca-Cola" and with deceptive and misleading pictures of coca leaves and cola nuts, and, in so doing, labels and brands it so as to mislead and deceive purchasers.

(b) Plaintiff sells its product under the name "Coca-Cola," which is the distinctive name of a compound or mixture of the drugs coca and cola, whereas plaintiff's product is not a preparation of that character, and, hence, is sold under the distinctive name of another article.

(c) Plaintiff sells its product as "Coca-Cola," which is the name Dr. Pemberton gave to an alleged secret proprietary article alleged to have been invented by him, and claimed to have been made and sold by plaintiff under that name for many years, whereas plaintiff's present product is not that article; and, hence, is sold under the distinctive name of another article.

(d) Plaintiff labels the receptacles containing its product with the words "Coca-Cola," and with pictures of coca leaves and cola nuts, which words constitute a statement, and which pictures constitute a design or device representing, that said product is essentially composed of the drugs coca and cola, which is not true; and, hence, that the labels attached to the receptacles containing plaintiff's product bear both a statement and a design or device regarding said product, and the ingredients or substances contained therein, which are false and misleading.

(2)—In failing to dismiss the bill for that reason.

III.

(1)—In failing to find that plaintiff's product is adulterated under Sec. 7 of the Food & Drugs Act because substantial and valuable constituents, to-wit: the drugs coca and cola, and their characteristic properties, have been wholly or in part abstracted from plaintiff's said product.

(2)—In failing to dismiss the bill for that reason.

IV.

(1)—In failing to find that plaintiff's business consists in the making of sales, and of contracts for the sale, of its product, in interstate commerce, for use, consumption, and resale within the United States; that such sales and contracts of sale are made upon the condition, agreement and understanding that the purchasers of plaintiff's product will not buy, handle, use, sell, or deal in the products of any of plaintiff's competitors; that, in the regular course of plaintiff's business, it fixes the price of its product, and discounts from, and rebates upon, such price, upon the condition, understanding and agreement that the purchasers thereof will not buy, handle, use, sell, or deal in the goods of any of its competitors; that said conduct has substantially lessened competition, and tended to create a monopoly of the commodity plaintiff manufactures, in trade and commerce among the several states, all of which is in direct violation of Sec. 3 of the Act of Oct. 15th., 1914, known as the Clayton Anti-Trust Act; and, hence, that plaintiff's business is illegal.

(2)—In failing to dismiss the bill for that reason.

V.

In sustaining the validity of the words "Coca-Cola" as a trade-mark, and adjudging that plaintiff is entitled to the exclusive use thereof, because said words are purely descriptive, and, as applied to plaintiff's product, are deceptive, and were not used exclusively by plaintiff

during the ten years next preceding the passage of the Trade-Mark Act of Feb. 20th., 1905.

VI.

(1)—In granting any relief under the Trade-Mark Act of February 20th., 1905, or upon the theory that plaintiff has a trade-mark in the words "Coca-Cola," (a) because said words are not a trade-mark for the reason that they are descriptive, and, as applied to plaintiff's product, are deceptive, and were not exclusively used by plaintiff during the ten years next preceding the passage of said Act; and (b) because said words are used by plaintiff with the design of deceiving the public in the purchase of its product, and in an unlawful business, within the meaning of Sec. 21 of said Act.

(2)—In failing to adjudge the costs of the cause, in so far as relief was sought for the infringement of a trade-mark, against the plaintiff.

VII.

In enjoining the defendants from using or employing the words "Coca-Cola," or any like words, because:

(1)—There was no averment in the bill, as amended, that the defendants ever had used said words, or any like words, unfairly, or in such a way as to palm off their product as and for plaintiff's, and there was no evidence that defendants had ever done so, and the greater weight of the evidence was against any such finding.

(2)—The words “Coca-Cola” not being a trade-mark, plaintiff is not entitled to the exclusive use of them absolutely and unconditionally.

(3)—Said injunction is broader than is warranted by either the pleadings or the testimony, in that it absolutely and unconditionally enjoins the defendants from using or employing the words “Coca-Cola,” or any like words, in any manner, for any purpose, regardless of whether such use is fair or unfair, and, hence, affords plaintiff all the protection of a technical trade-mark in the use of words which are incapable of exclusive appropriation as a trade-mark.

VIII.

In finding and adjudging that the words “Koke” and “Dope” are each an abbreviation of the words “Coca-Cola,” and in enjoining their use by defendants on that ground, (a) because there was no evidence to sustain said finding, and (b) because said finding was against the greater weight of the evidence and is an absurdity.

IX.

In finding and adjudging that the words “Koke” and “Dope” each infringe the words “Coca-Cola” as a trade-mark, because:

(1)—Under the pleadings, as amended, there was no issue requiring or authorizing such an adjudication.

(2)—The words “Coca-Cola” are not a trade-mark, and, therefore, cannot be infringed as such.

(3)—There was no evidence to sustain the finding.

(4)—Said finding was against the greater weight of the evidence.

(5)—Defendants' predecessors rightfully used the words "Coca-Cola" as a mark upon their goods prior to any use thereof by plaintiff's predecessors, and only discontinued the use thereof when they began to use the word "Koke," which word they began to use either before, or at the time, plaintiff's predecessors began to use the words "Coca-Cola," and have continuously used it ever since, so that, if the word "Koke" is, indeed, an infringement of the words "Coca-Cola," then, when defendants' predecessors began to use it they were guilty of nothing more heinous than of infringing the appropriate descriptive name of the article they sold, which name they themselves had the right to use, and had been using before plaintiff's predecessors ever used it.

X.

The District Court erred, and was guilty of an abuse of discretion, in passing the order entered Feb. 20th., 1915, granting plaintiff leave to amend its original bill.

XI.

In finding that the words "Koke" and "Dope" are each used by the public and by purchasers in designating plaintiff's product, because it was established by the greater weight of the evidence that said words are purely descriptive slang words, having reference solely to

the nature, ingredients, or effects of the kind of commodity they are used to indicate, and are used by the public solely to indicate the character of commodity desired, and not any particular manufacture thereof.

XIII.

In adjudging that defendants have no right to use the words "Koke" and "Dope," and in enjoining them from using either of those words, or any like words, and from claiming or asserting any right therein, because:

(1)—It was established by the greater weight of the evidence: (a) that defendants' predecessors in title adopted and began to use said words, at least in a manner analogous to trade-mark use, before either of them was ever used by the public to describe the nature, ingredients, or effects of plaintiff's product; (b) that said words are purely descriptive slang words, having reference solely to the nature, ingredients, or effects of the commodity to which they are applied, and are used by the public and by purchasers solely to describe the characteristics, or supposed characteristics, of the kind of commodity they are used to indicate; (c) that said words are as aptly, appropriately, and truthfully descriptive of defendants' product as they are of plaintiff's; and (d) that plaintiff has never used or employed either of said words, or authorized or countenanced their use or employment, in any manner, but has openly and publicly repudiated them on all occasions as any sort of designation of its product.

(2)—Said injunction is broader than is warranted by either the pleadings or the evidence, in that (a) it prohibits the sale of defendants' product when it is asked for by words aptly, appropriately, and truthfully descriptive of it, and by the words most generally used to describe that character of commodity, and, therefore, practically prohibits the sale of defendants' product altogether, and gives to plaintiff a practical monopoly of the commodity which those words describe; (b) it absolutely and unconditionally enjoins defendants from using or employing the word "Koke," or the word "Dope," or any like word, in any manner, for any purpose, thus affording plaintiff all the protection of a technical trade-mark in words which it has never at any time used or employed for any purpose, which it has publicly repudiated on all occasions, and which are incapable of exclusive appropriation because purely descriptive; (c) it absolutely and unconditionally enjoins defendants, not merely from using the words "Koke" and "Dope," but also from using any like words, and, since the words "Koke" and "Dope" are merely descriptive of the kind of commodity they are used to indicate, any other words that aptly and appropriately described that kind of commodity would necessarily have the same meaning, and would, therefore, be "like words;" and, hence, said injunction enjoins defendants from describing their product by any words whatever; (d) it is not limited so as to merely enjoin any *unfair* use of the words "Koke" and "Dope," or of any like words, or the use of them in such a way as to enable defendants' product to be passed off as and for plaintiff's, but *absolutely* and *unconditionally*

enjoins *any* use of them at all, under any circumstances, and for any purpose, regardless of the manner in which they may be used.

(3)—There was no evidence to sustain the finding that defendants have ever used the words “Koke” and “Dope,” or any like words, unfairly, or in such manner as to enable their goods to be passed off for plaintiff’s, the mere *use* of those words by defendants, and not any *unfair* use of them, being all that was established.

(4)—The greater weight of the evidence was against any finding of unfair use of said words by defendants.

XIII.

In enjoining defendants from threatening any prosecution or interference with the use of the words “Koke” and “Dope” as short names or nick-names for plaintiff’s product, because it was established by the greater weight of the evidence:

(1)—That said words are not short names or nick-names for plaintiff’s product.

(2)—That the action of the defendants in warning the trade that they had obtained registration of said words in the Patent Office as trade-marks for their product and that any invasion of their rights would subject those guilty to prosecution, was taken in good faith, and was not for the purpose of harrassing the persons selling plaintiff’s product, or of embarrassing or damaging plaintiff in its business.

(3)—That, although plaintiff certainly has no greater right to use the words “Koke” and “Dope” than have the defendants, nevertheless it has itself not only threatening prosecutions of those selling defendants’ product, but has actually brought numerous malicious and vexatious suits against them for alleged infringement of its alleged rights in selling defendants’ product on calls for “coke” and “dope,” and has, by means of threats and intimidations, and in an unlawful attempt to monopolize the entire vocabulary of trade slang used by the public in describing the kind of commodity which both it and defendants manufacture and sell, and to thus drive defendants, as well as its other competitors, out of business and destroy all competition, coerced numerous persons selling defendants’ product and the products of its other competitors, into signing contracts with it agreeing, in violation of Sec. 3 of the Clayton Anti-Trust Act, not to buy or sell, in the future, any product like plaintiff’s but that of its manufacture, and not to sell or dispense, either when “coke,” or “dope,” or any of the other trade-slang, is used any beverage but that made from the syrup manufactured by it, and has otherwise harrassed and annoyed defendants’ dealers, and embarrassed and damaged defendants in their business, and destroyed a large part of their trade; and that, consequently it does not lie in the mouth of plaintiff to complain of the comparatively trivial acts of the defendants in printing the warning aforesaid and, hence, that plaintiff is not entitled to an injunction against defendants on that account.

XIV.

In enjoining defendants from using labels, designs, or devices like those of the plaintiff, or the labels, designs and devices used by the defendants, and referred to in the bill, because:

(1)—There was no evidence to sustain any finding that defendants have ever used any labels, designs, or devices like those of plaintiff.

(2)—It was established by the greater weight of the evidence that the labels, designs and devices used by the plaintiff are not peculiar or distinctive in any sense of the word, and do not serve to identity or distinguish its product, but are old in the art and common to the trade.

XV.

In enjoining defendants from using barrels or receptacles colored in imitation of plaintiff's barrels or receptacles, because:

(1)—It was established by the greater weight of the evidence that (a) the color of plaintiff's barrels is not distinctive, and does not serve to identify or distinguish them, but is the color used generally in trade since time immemorial for syrup barrels, as well as for many other kinds of barrels, and is old in the art and common to the trade; (b) that defendants and their predecessors used barrels of that kind and color, as receptacles for syrup similar to plaintiff's syrup, before plaintiff's predecessors did, and have continuously done so ever since; (c)

that dealers cannot possibly be deceived, by the color of the barrels, as to who is the manufacturer of the syrup contained therein, and that consumers and the public do not see the barrels at the time of purchasing the beverage made from the syrup shipped therein; (d) that the color of defendants' barrels is merely an incident to the use of the cheapest and most appropriate and serviceable kind of paint to be had, and results from the fact that said paint produces only the one color and shade; (e) that the color of none of plaintiff's receptacles is distinctive, but that the color of all of them is old in the art, and common to the trade.

(2)—Said injunction is broader than is warranted by the pleadings or the evidence in that (a) it enjoins the defendants, not only from using barrels resembling plaintiff's barrels in color, but also from using *receptacles of any kind* resembling in color the corresponding receptacles used by plaintiff, without regard to whether or not the color of such receptacles is distinctive, or is common to the trade; and (b) prohibits defendants from painting their barrels with the cheapest and most appropriate and serviceable kind of paint they can buy, and the kind which is, for that reason, in almost universal use for that purpose.

XVI.

In enjoining the defendants from stating or representing that the syrup made by them is "made according to the same formula as 'Coca-Cola' syrup," because:

(1)—It was established by the greater weight of the evidence that defendants have not stated that their syrup is made according to the same formula as plaintiff's present syrup.

(2)—Plaintiff represents that the syrup now made by it is made according to the original "Coca-Cola" formula, which is not true, and hence plaintiff is not in any attitude to complain that defendants are making similar false statements.

XVII.

In enjoining the defendants from stating or representing that they know, or may rightfully use, the "Coca-Cola" formula, because:

(1)—It was established by the greater weight of the evidence that defendants' predecessor in title, J. C. Mayfield, did know the "Coca-Cola" formula, and that he imparted his knowledge of said formula to the Koke Company of America.

(2)—It is admitted that the "Coca-Cola" formula is not patented; and, therefore, it may rightfully be used by all the world.

(3)—Defendants have the right, under the law, to use and employ the "Coca-Cola" formula.

XVIII.

In enjoining defendants from coloring any product

not the plaintiff's in imitation of, or like, the color of "Coca-Cola," without clearly indicating in connection with the sale thereof that the same is the product of the defendants, and not of the plaintiff, because:

(1)—It was established by the greater weight of the evidence that (a) the defendants were, when the bill was filed, clearly indicating, in connection with the sale of their product, that it was their product, so that the injunction is entirely superfluous; (b) the color of plaintiff's product is not peculiar or distinctive, and does not identify or distinguish it, but is the usual and customary color of that kind of commodity, and is common to the trade; (c) plaintiff itself does not clearly indicate, in connection with the sale of its product, whose product it is; (d) defendants' predecessors manufactured and sold a syrup having precisely the same color as plaintiff's product, and as "Coca-Cola," prior to the time that plaintiff's predecessors began to make and sell such a product, and they and defendants have since continuously manufactured and sold said syrup, and other similar syrups having identically the same color.

(2)—Said injunction, in so far as it requires defendants to state affirmatively that their product is not the plaintiff's, requires them to extol plaintiff's product in an attempt to sell their own.

(3)—The color of defendants' syrup is not merely a fanciful feature of dress, but is an indispensable structural feature of the article, and a physical requirement essential to commercial success.

XIX.

In enjoining the defendants from doing any act or thing, or using any name or names, devices, artifices, or contrivances which may be calculated to represent that any product not of plaintiff's production is the genuine product of the plaintiff, because:

(1)—The greater weight of the evidence was against the finding that the defendants had been guilty of any such conduct.

(2)—Said injunction is too vague and indefinite in that it is a broad, general, sweeping command to desist from any and all unfair competition, without specifying with certainty and particularity what is prohibited.

XX.

In adjudging that the Koke Company of America and its predecessor, J. C. Mayfield, did not adopt or make use of the word "Koke" until the year 1909, because said finding was against the greater weight of the evidence.

XXI.

In adjudging that the defendants and their predecessors have no interest in, or claim to, the alleged trade-mark "Coca-Cola," or the "Coca-Cola" business or formula, and that their claim of interest in said business and alleged trade-mark, and of knowledge of said formula, are without foundation, because:

(1)—Said finding was against the greater weight of the evidence.

(2)—It was established by the greater weight of the evidence that neither the defendants, nor their predecessors, ever claimed any interest in the alleged trade-mark "Coca-Cola," or the "Coca-Cola" business, in recent years, their claim merely being that one of their predecessors' formerly owned an interest therein.

XXII.

In finding that defendants' salesmen were instructed to sell, and did sell, defendants' product under the names "Koke" and "Dope" as and for plaintiff's product, because said finding was against the greater weight of the evidence.

XXIII.

In finding and adjudging generally that defendants have infringed plaintiff's alleged trade-mark and have been guilty of unfair competition with plaintiff, because said finding and adjudication were against the greater weight of the evidence.

HISTORY OF COMPANION CASES.

The case at bar is only one of a series of suits brought by plaintiff against the defendants and their dealers in various parts of the country, involving substantially the same questions.

On July 23rd., 1913, plaintiff filed a suit against Joseph D. Branham, et al., bottlers and wholesale distributors of defendants' product, in the District Court at Tulsa, Oklahoma, alleging that they were infringing its alleged trade-mark "Coca-Cola" by using the word "Koke;" and that they were passing off a beverage resembling plaintiff's, in response to requests for "Koke" and "Dope," as and for plaintiff's product, in bottles deceptively resembling plaintiff's bottles, and under deceptively similar crowns and labels. After a full hearing on the merits, the District Court dismissed the bill, holding that "Koke" does not infringe "Coca-Cola;" that "Koke" and "Dope" are not used by the public to specifically designate plaintiff's product; that neither the color of plaintiff's syrup, nor the general features of its bottles is, or are, distinctive, in any sense of the word; that defendants' crowns and labels do not deceptively resemble those of plaintiff; that defendants' product had not in fact been passed off for plaintiff's; and that the defendants had not advised or encouraged their retail dealers in any way to sell their product as plaintiff's product. (*Coca-Cola Co. v. Branham, et al.*, 216 Fed. 264; *Defendants' Exhibit 272*.) Plaintiff appealed the case to the Circuit Court of Appeals for the 8th Circuit, at St. Paul, Minn., but, the day before the hearing, dis-

missed its appeal and paid all the costs. (*Defendants' Exhibit 273*).

On April 9th., 1914, plaintiff brought suit in the District Court at Dallas, Texas, against the Koke Company of Texas, *et al.*, and in the District Court at New Orleans against the Southern Koke Company, Limited, *et al.*, and in the District Court at St. Louis against the Koke Company of America *et al.* The cases at Dallas and at St. Louis have not been tried. The case in New Orleans was tried in February, 1917, but Judge Foster, who tried it, stated that inasmuch as the case was between substantially the same parties as those in the present case, and involved identically the same issues and was tried upon identically the same testimony, he was of the opinion that it fell within the principles of *res adjudicata*, and, accordingly, entered the same decree as Judge Sawtelle entered in the case at bar, with the understanding that it is to remain interlocutory, and to be modified later so as to conform to the decree which this court finally directs to be entered.

In 1913 the Koke Company of America applied to the Patent Office for a re-registration of the word "Koke." The Coca-Cola Company opposed the re-registration on the ground that the word "Koke" was an infringement of its alleged trade-mark "Coca-Cola," but subsequently amended its pleadings so as to allege that "Koke" was a nick-name for its product. After various preliminary hearings before the inferior tribunals of the Patent Office, the Commissioner of Patents in person finally denied a re-registration, on the ground, as plaintiff there

insisted, that the word "Koke" is a descriptive term which describes the commodity defendants make and sell. The gist of his decision, which was handed down August 14th., 1917, was stated in the closing paragraph, as follows:

"In the case at bar, however, the question is distinctly presented whether one has the right to adopt as his trademark the popular pseudonym for the goods which he sells. The answer must be in the negative."

From this decision the Koke Company of America formally appealed to the Court of Appeals for the District of Columbia, but declined to prosecute the appeal and allowed it to be dismissed.

Brief and Argument

PLAINTIFF'S UNCLEAN HANDS

I.—THE THEORY.

A.—THE RULE STATED.

In cases of this kind, where a plaintiff seeks relief against the alleged frauds of others, it is indispensable to the plaintiff's right to relief that it be itself free from fraud in the matter of which it complains. If the plaintiff's sales are effected by means of misrepresentations and falsehoods, it cannot be heard when it complains that, by the alleged fraudulent rivalry of others, its own fraudulent profits are diminished; and, if the plaintiff itself is engaged in deceiving the very public whom it claims to protect from the deception of others, it cannot be heard to complain that others are interfering with its right to deceive that public by similar acts of deception. A court of equity will not lend its aid to prevent an infringement of an alleged trade-mark which contains a material false representation calculated to deceive purchasers of the article sold with it, or which is made the basis of false representations in carrying on the business in which it is used; nor will a court of equity lend its aid to the promotion of fraud by enjoining alleged unfair competition in the perpetration of that fraud. In such cases the courts do not take into consideration the attitude of the defendant. Although the defendant's conduct is without justification, this, in the eye of a court of equity, affords no reason for interference. The court will not become a party to the plaintiff's

iff's fraud by preserving to the plaintiff the right to deceive the public without interruption. This is but an application of the common maxim that, "He who seeks equity must come into court with clean hands." If the plaintiff's case discloses fraud, deception, or misrepresentation on its part, all relief will be denied to it. Upon the fact appearing, equity will withhold its hand, upon its own motion, and, in the interest of the public, deny its assistance to the plaintiff. To grant relief would not only thereby secure to the plaintiff the exclusive privilege of deceiving the public, but would perpetuate the fraud by the decree of the court. It is the plaintiff who is first judged, and it is not until its conduct is shown to be without fault that the acts of the defendant, however flagrant, are considered. A single material false representation on plaintiff's packages, or in its advertisements, terminates the case.

b.—THE RULE APPLIED.

In the case at bar it is manifest that, whatever may be said of the conduct of the defendants herein, the plaintiff itself is misleading and deceiving the public by means of its alleged trade-mark, its labels, circulars and advertisements, with respect to the nature and ingredients of the product it seeks to protect; and, hence, that it has no standing to maintain this proceeding, and should be repelled and denied all relief, irrespective of whether or not it has made out a proper case for relief in other respects.

The compound word "Coca-Cola" is a descriptive

term, and purports to describe a compound or mixture of coca and cola. As applied to plaintiff's product, it leads to the belief on the part of the public that that product is composed essentially of the drugs coca and cola, and this belief is strengthened and confirmed by the presence of pictorial representations of coca leaves and cola nuts on plaintiff's labels in connection with the words "Coca-Cola." Originally, plaintiff's product was a "medicinal article," and was mainly recommended for the cure of "headache, neuralgia, hysteria, melancholy, etc.," and "all nervous affections." It was first called "Coca Cola Syrup & Extract," then "Coca Cola Syrup," and, finally, just plain "Coca Cola." It was held out as an "intellectual beverage," a "valuable brain tonic," and an "ideal nerve tonic and stimulant." It consisted essentially of fluid extract of coca and caffeine. These were the "medicinal" agents. The other constituents were simple syrup (sugar dissolved in water), flavoring extracts, and coloring matter. The fluid extract of coca was the hydro-alcoholic extract obtained by extracting cocaine from coca leaves by means of diluted alcohol. It was nothing more than a concentrated solution of cocaine in alcohol and water, although, of course, it also contained minute traces of inert impurities which the alcohol extracted from the coca leaves along with the cocaine. The caffeine was the pure commercial article that is generally sold on the market in this country, and was obtained from "tea dust," or the "sweepings" of the tea trade. The remedy's chief claim to merit was due to its amazingly exhilarating effect. This effect was produced by the combined action of the two

active agents—cocaine and caffeine. Plaintiff widely advertised the virtues of its preparation to be due to the “tonic and nerve stimulant properties” of “the wonderful coca plant and the famous cola nut” of which it was represented to be composed. Its popularity arose from the belief in the mind of the public that it was a compound or mixture of coca and cola, and, therefore, possessed the powerful “tonic and nerve stimulant properties” of those two drugs; and plaintiff built up its business, and the reputation and demand for its product, on the strength of that belief.

From the very beginning plaintiff’s representations as to the ingredients of its remedy were misleading. Even as applied to this original product, the term “Coca-Cola” was not a wholly truthful description of the article. It was not “*Coca-Cola*.” It was “*Coca-Caffeine*.” While caffeine is the active constituent of cola, and the only thing of any importance which it contains, nevertheless *caffeine* is not *cola*. It is no more cola than it is tea or coffee, or guarana, mate, Paraguay tea, or Youpon, for it is likewise the active constituent of each of these plants and occurs in them in much larger quantities than it does in cola nuts. Indeed, the caffeine on the market in this country is obtained almost exclusively from tea leaves. None of it comes from cola nuts. It would have been quite as truthful a description of a preparation of coca and caffeine, such as plaintiff’s original product was, to have called it “*Coca-Tea*,” or “*Coca-Coffee*,” as to have called it *Coca-Cola*.” In fact, in the case of plaintiff’s preparation, it would have been more nearly truthful to have described it as “Coca-

Tea," for the caffeine of which it was composed was caffeine extracted from tea leaves, and not caffeine obtained from cola nuts.

In 1906, upon the passage of the Food & Drugs Act, plaintiff discontinued the use of coca altogether as a material ingredient of its co-called "Coca-Cola." It thus destroyed the last vestige of justification for continuing to represent the stuff to be "Coca-Cola." It never had been "*Cola*." It now ceased to be "*Coca*." Thenceforth the only active agent was caffeine. It is not now "Coca-Cola" in any sense of the word. It contains neither *coca* nor *cola*, nor any appreciable quantity of anything derived from either of those drugs. It is now nothing more than a *syrup of caffeine*.

Thus, in advertising and selling such a preparation as "Coca-Cola," and in labeling the receptacles containing it with the falsely descriptive name "Coca-Cola," and with pictures of coca leaves and cola nuts, plaintiff is guilty of carrying on the business for which it asks protection by means of such material false representations as forfeit its right to claim the assistance of a court of equity.

It is not necessary to indulge in any speculation as to the deceptive character of these false representations. Actual deception of large numbers of plaintiff's customers is admitted. It is admitted that many have been led to believe, and now believe, from the name "Coca-Cola," that the article is composed essentially of the drugs coca and cola, and that it must, therefore, con-

tain the efficacious "tonic and nerve stimulant properties" of those two drugs. It is admitted that one of the things that gave the stuff the most sale, when the business was being built up and established, was the false representation that it was made from the "crude African cola nut" instead of caffeine extracted from tea leaves. It is admitted that the wide-spread delusion of the public to the effect that the preparation still contains cocaine,—the "tonic and nerve stimulant property" of coca,—is due to the continued use by plaintiff of the deceptive name "Coca-Cola."

Thus the relief sought by plaintiff is, in truth, the exclusive privilege of deceiving the public,—the exclusive privilege of palming off its preparation of caffeine as and for a preparation of coca and cola.

"Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public." *McConnell v. Reed*, 128 Mass., 477.

"To afford protection to a trade-mark containing a false representation would perpetuate the falsehood by the decree of court." *Johnson & Johnson v. Seabury & Johnson*, 71 N. J. Eq., 950.

II. THE LAW.

The law applicable to the situation here disclosed has been announced time and again, both in England and in this country, in an unbroken current of decisions, and, indeed, is but an application of one of the maxims of the court.

a.—GENERAL STATEMENT OF THE GOVERNING PRINCIPLE.

28 *Am. & Eng. Enc. of Law*, 352:

“It is a general rule of equity jurisprudence that he who seeks equity must do equity; he must come into equity with clean hands. This maxim has been applied in trade-mark cases with great vigor, and there are many cases where, although the imitation of the plaintiff’s labels and trade-marks has been of a most flagrant nature, yet the protection of equity has been denied him in consequence of some false statement contained upon his label or on some publication issued in connection with the sale of his goods. False statements as to ingredients, maker, cures, harmlessness, purity, place of manufacture, and even words not intended to mislead but capable of being misunderstood, have been held sufficient to disentitle a plaintiff to relief. To protect such a trade-mark would be to secure to the plaintiff the exclusive privilege of thereby deceiving the public. The general rule seems to be that the mis-statement of any material fact calculated to deceive the public will be sufficient to defeat an application for relief. A misrepresentation as to the ingredients of an article is sufficient to debar a plaintiff from relief.”

38 *CYC.*, 700:

“If an alleged trade-mark involves any material untruth, misrepresentation, or bad faith it will not be protected against infringement. To have this effect, it is not necessary that the misrepresentation be part of the trade-mark itself, or that it appear upon the face of the label. Misrepresentations in circulars and advertisements may be sufficient to bar relief. *** Misuse of a trade-mark is a bar to relief, as where plaintiff himself uses it to deceive the public.”

And again, 704:

“Misrepresentations as to character, quality, purity, or ingredients of an article, or as to the place where an article is manufactured, or from which it or its ingredients are derived, or as to the person by whom the goods are made or sold, are material representations, and, if false, will constitute a bar to any relief.”

And again, 797:

“If a trade or calling, as carried on, is illegal, deceptive, or fraudulent, names, marks, or devices used therein will not be protected upon the ground of unfair competition, no matter how plain defendant’s fraud may be, although a proper case for relief is made out in all other respects.”

And again, 897:

“By the weight of authority, unclean hands is not strictly a defense, and need not be pleaded. Upon the fact appearing, equity will withhold its hand, upon its own motion, and, in the interest of the public, deny its assistance to plaintiff.”

The leading English case is that of *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S., 136, [33 L. J. Ch. (N. S.) 199, 10 Jur. (N. S.), 81, 9 L. T. (N. S.), 558, 12 Week. Rep., 289; affirmed, 11 HL., 523], wherein Lord Chancellor Westbury stated the rule as follows:

“When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in the business connected with it, be himself guilty of any false or misleading representations; for, if the plaintiff himself makes false representations in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity. Where a symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it; or, in other words, the right to the exclusive use of it cannot be maintained.”

In *Fetridge v. Wells*, 4 Abb. Pr., 144, Chief Justice Duer stated the rule in this language:

“Those who come into a court of equity seeking equity must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentations and falsehood, they cannot be listened to when they complain that, by the fraudulent rivalry

of others, their own fraudulent profits are diminished. An exclusive privilege of deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

In *Manhattan Medicine Co. v Wood*, 108 U. S. 218, 227, (27 L. ed., 706, 708), the Supreme Court, speaking through Mr. Justice Field, expressly approved the foregoing statement of the rule:

"A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured. *** To put forth a statement in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a particular person whose manufacture there had acquired great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance.

"This doctrine is illustrated and asserted in the case of *Leather Cloth Co. v. American Leather Cloth Co.*, which was elaborately considered by Lord Chancellor Westbury, and afterwards in the House of Lords, on appeal from his decree."

After quoting with approval the language of the Lord Chancellor, Mr. Justice Field proceeded:

"When the case reached the House of Lords, the correctness of this doctrine was recognized by Lord Cranworth, who said that of the justice of the principle no one could doubt; that it is founded in hon-

esty and good sense and rests on authority as well as on principle. ***

“The soundness of the doctrine declared by the Lord Chancellor has been recognized in numerous cases. Indeed, it is but an application of the common maxim, that, he who seeks equity must present himself in court with clean hands. If his case discloses fraud, or deception, or misrepresentation on his part, relief there will be denied.

“Long before the case cited was before the courts, this doctrine was applied when protection was sought in the use of trade-marks. In *Pidding v. How*, 8 Sim., 477, which was before Vice Chancellor Shadwell in 1837, it appeared that the complainant was engaged in selling a mixed tea composed of different kinds of black tea, under the name of ‘Hawqua’s Mixture,’ in packages having on three of their sides a printed label with these words. The defendant having sold tea under the same name, and in packages with similar labels, the complainant applied for an injunction to restrain him from so doing. An *ex parte* injunction, granted in the first instance, was dissolved, it appearing that the complainant had made false statements to the public as to the teas of which his mixture was composed, and as to the mode in which they were procured. ‘It is a clear rule,’ said the Vice Chancellor, ‘laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth.’

“In *Perry v. Trufitt*, 6 Beav., 66, which was before Lord Langdale, Master of the Rolls, in 1842, a similar ruling was had. ***

“In a case in the Superior Court in the City of New York, *Fetridge v. Wells*, 4 Abb. Pr., 144, this

subject was very elaborately and ably treated by Chief Justice Duer."

After quoting with approval the above abstract from the decision of Chief Justice Duer, Mr. Justice Field concluded:

"The doctrine enunciated in all these cases is founded in honesty and good sense; it rebukes fraud and encourages fair dealing with the public. In conformity with it, this case has no standing before a court of equity. The decree of the court below dismissing the bill must, therefore, be affirmed, and it is so ordered."

Ubeda v. Zialcita, 226 U. S., 452, 57 L. ed., 296, (Mr. Justice Holmes):

"Imposition on the public is not a ground on which the plaintiff can come into court, but it is a very good ground for keeping him out of it."

Holzapfel's Composition Co. v. Rahtjen's American Composition Co., 183 U. S., 2, 8, 46 L. ed., 53, (Mr. Justice Peckham):

"We are of the opinion that no valid trade-mark was proved on the part of the Rahtjen's, in connection with the paint sent by them from Germany to their agent in the United States. *** A symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained. *Manhattan Medicine Co. v. Wood*, 108 U. S., 218, 225, 27 L. ed., 706, 708, 2 Sup. Ct. Rep., 436; *Allen B. Wrisley Co. v. Iowa Soap Co.*, 104 Fed. 548."

Nelson v. J. H. Winchell & Co., 203 Mass., 75, [89 N. E., 180; 23 L. R. A. (N. S.), 1150, 1156]:

“Equity will not lend its aid against the infringers of a trade-mark which contains a material false representation, adapted to deceive purchasers of the article sold with it, or which is made the basis of false representations in carrying on that business in which it is used. *** This is but an application of the common maxim that he who seeks equity must come into court with clean hands. If his case discloses fraud, deception, or misrepresentation on his own part, relief will be denied to him.”

Prince Manufacturing Co. v. Prince's Metallic Paint Co., 135 N. Y., 24, 38; (39 L. R. A., 129, 134; 31 N. E., 990), Andrews, J.:

“As was said by Lord Romilly in *Cox v. Chandler*, L. R. 11 Eq., 446, ‘The administration of equity is founded in perfect truth.’ The party who comes into a court of equity for relief against fraud must himself be free from fraud in the matter of which he complains, or, as is frequently said, he must come with ‘clean hands.’ The courts have in many cases applied this principle in bar of relief in cases of trade-marks. Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. Although the defendant’s conduct is without justification, this, in the eye of a court of equity, affords no reason for interference. *** And, although the false article is as good as the

true one, 'the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce.' ”

Siegart v. Abbott, 61 Md., 276, 284:

“It is a general rule of law, in cases of this kind, that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels.”

Joseph v. Macowsky, (Cal.) 19 L. R. A., 53, 57:

“A person who comes into a court of equity for an injunction, in a case of this kind, must come with clean hands. He cannot be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation calculated to deceive the public.”

Hobbs v. Francais, 19 How. Pr., 567:

“To secure to the plaintiff by injunction the exclusive use of such a label, and the exclusive privilege of thereby deceiving the public, is an object to which a court of equity will not lend its aid. The court does not refuse its aid in such a case from any regard to the defendant, who is using the same efforts and misrepresentation to deceive the public; but on the principle that it will not interfere to protect a party in the use of trade-marks which are employed to deceive the public.”

Connell v. Reed, 128 Mass., 477 (35 Am. Rep., 397), Gray, Ch. J.:

“The conclusive answer to this suit is *** that the plaintiffs have adopted and used these words

['East Indian'] to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public."

Sartin v. Schaden, 125 Ia., 696, (101 N. W., 511):

"Of course plaintiff must come into court with clean hands. If he himself has been guilty of unfair competition, or has made false statements on his label calculated to deceive the public as to the nature of his wares, as to the makers of the article, as to its constituent parts *** or any other statements calculated to mislead or defraud, this will deprive him of his right to complain of the defendant for a fraud practiced by him. This is fundamental doctrine and we need not here cite any authorities in its support. They may be found in 28 Am. & Eng. Enc. of Law (2nd Ed.) pp. 352 to 357 inclusive."

Koehler v. Sanders, 122 N. Y., 65; (25 N. E. 235; 9 L. R. A., 576 and 578), Bradley, J.:

"The consideration of good faith to the public is so far deemed due from a party taking a name or trade-mark for his business or goods that equity will not grant relief for the protection of the exclusive use of a misrepresentation by means of such name or trade-mark, when it may tend to deceive and mislead the public, or to impose upon and induce persons to become his patrons. In other words, a party successfully seeking equitable relief in such case must come into the court with clean hands.

*** The application of the rule now under consideration does not depend upon the question of actual injury to others in any particular case, but is founded upon the salutary principle that equitable relief will not be given in support of misrepresentation in fraud of the public, and by which they may be misled or deceived. This is the situation of the plaintiffs in respect to the remedy they sought by this action. *** These views lead to the conclusion that the order must be affirmed, and judgment absolute directed for the defendants.”

Regent Shoe Mfg. Co. v. Haaker, 75 Neb., 427 [106 N. W., 595; 4 L. R. A. (N. S.), 447-451]:

“It is an elementary principle that he that asks equity must come with clean hands, and, as well stated in *Clinton E. Worden & Co. v. California Fig Syrup Co.*, 187 U. S., 516; (47 L. Ed. 282; 23 Sup. Ct. Rep. 161): ‘When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in his advertisements and business, be himself guilty of any false or misleading representations.’ It is, however, not every exaggerated puff of ones own goods that is to be regarded as such a false representation as will deny relief in a court of equity. It is rather such materially fraudulent statements as to the character, quality, and make of the goods as tend, if untrue, to impose upon and deceive the purchaser. Such imposition might be made by representing the shoes sold by defendant to have been manufactured by some firm of known and established reputation, when they were not, or it might be by

representing the wares to be of a material of which they were not made.”

Simmons Medicine Company v. Mansfield Drug Company, 93 Tenn., 84-94:

“The principle is general, and is one of the maxims of the court, that he who comes into a court of equity asking its interposition in his behalf must come with clean hands; and if it appear from the case made by him, or by his adversary, that he has himself been guilty of unconscientious, inequitable, or immoral conduct, in and about the same matters whereof he complains of his adversary, or if his claim to relief grows out of, or depends upon, or is inseparably connected with, his own prior fraud, he will be repelled at the threshold of the court.

*** It is true, as insisted by complainant, that this objection is not set up in defendant’s answer in the case at bar. Nor was that necessary. In the case of *Fetridge v. Wells*, 13 How. Pr. R., 385 (R. Cox, 180) where this question arose in a similar case, said Duer, J.: ‘The remarks that I have now made would suffice for the decision of this motion were the only question that of a similarity of the trademarks; but there is another, and a grave and important question, to which the counsel for the defendants have earnestly directed my attention. That question is whether, even upon the supposition that all the material allegations of the complaint are true, the conduct and proceedings of the plaintiff and his firm have not been such as justly to preclude them from any claim to relief in a court of equity. This question, it is true, is not raised in the answer of the defendants, but it is raised by the facts which the affidavits and other papers before

me have disclosed, and, in my opinion, it is emphatically the question that, as a judge in equity, I am bound to consider and determine.' And in *Connell v. Reed*, 128 Mass., 477, the fraud was first disclosed in the report of the Master upon the subject whether there had ever been a former use of the trade-mark in controversy, and when this report came in containing the information that the plaintiff had adopted and used the words 'East Indian' to denote and to indicate to the public that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which was the fact, the court declined to entertain the proceedings further, saying: 'Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public.' It is not, strictly speaking, a defense at all, but rather an interposition by the court in behalf of the public to discourage fraud and wrong upon the public."

Preservaline Manufacturing Company v. Hellmer Chemical Company, 118 Fed., 103:

"It is apparent from the packages and circulars presented in the case that the defendant has substantially appropriated complainant's trade name, packages, and designs, as well as his trade circulars, and that complainant is entitled, in a proper case, to the relief prayed for in its bill, unless it is barred by its own acts from invoking the aid of a court of equity in the premises. *** It is a well established rule of law that one invoking the aid of a court of equity must himself be free from fraud and misrepresentation with regard to the matter in which he seeks relief. Therefore, if it appears that

complainant in this case, at and preceding the time of the acts sought herein to be enjoined, was itself guilty of a fraud or fraudulent acts calculated to impose upon the public with regard to the same transaction, a court of conscience will not lend itself to complainant's aid in securing to it an exclusive right to deceive the public. ***

"It therefore remains only to determine whether complainant comes within the rule of courts of equity denying relief. *** The natural effect of the language used upon the five circulars attached to complainant's bill is to mislead and deceive the public, and complainant cannot be heard to deny the intention of so doing."

Parlett v. Guggenheimer, 67 Md., 542; (1 Am. St. Rep., 416, 418):

"Trade-marks are protected by courts of equity for two reasons: One is to secure to the honest, skillful and industrious manufacturer the legitimate fruits of his skill and industry, and the other is to protect the public against the frauds of unprincipled vendors who seek to pass off spurious wares as those of established reputation under the name of the genuine commodity: Upton on Trade-marks, pages 28 and 29. The same author goes on to say that such protection is only afforded the honest manufacturer, and that where a person seeks, by representations which are untrue (whether forming a part of his trade-mark or not), to mislead the public into a belief that his commodities have an origin other than the true one, he is entitled to no relief against any one who may see fit to appropriate it. *** From these, and many similar cases which might be cited, the conclusion is irre-

sistible that he who seeks to mislead the public and palm off on it the spurious for the genuine article under the guise of his trade-mark, or coupled with it, forfeits for all time, not his right to use his trade-mark, for with that the courts will not interfere, but his right to have that trade-mark protected."

This doctrine has been recognized and followed in this circuit:

Alaska Packers' Association v. Alaska Imp. Co., 60 Fed., 103 (McKenna, Circuit Judge):

"This is an action for the infringement of a trade-mark. *** The defendant is using a label and brand in imitation of the complainant's label and brand. *** The label used by the complainant contains the following statement: 'Packed at Karluck, Kodiak Island, Alaska, by the Aleutian Islands Fishing & Mining Company, San Francisco, California.' The defendant contends, among other things, that this statement is false, and that complainant, therefore, is not entitled to relief in equity. As I think this is true, it will not be necessary to consider the other points made by respondent. See *Hazard v. Caswell*, 93 N. Y., 268; *Medicine Co. v. Wood*, 108 U. S., 218; 2 Sup. Ct. Rep., 426; *Symonds v. Jones*, 82 Me., 302; 19 Atl. 820. The complainant does not contest the point that, if the representations of the label are false, equity will not relieve against its imitation. *** The allegations of the bill bring complainant within the admission." (The bill was dismissed.)

In *G. Heileman Brewing Co. v. Independent Brewing Co.*, 191 Fed., 489, 493 ("C. C. A."-9), this court said:

“It is quite true that the trade-mark relied upon, and which is claimed to be infringed, if it contains misrepresentations misleading to the public, cannot be made the basis of relief in equity. *** *Manhattan Medicine Co. v. Wood*, 108 U. S., 218. *** To the same effect is *Connell v. Reed*, 128 Mass., 477; 35 Am. Rep. 397.”

Johnson & Johnson v. Seabury & Johnson, 71 N. J. Eq., 750; [12 L. R. A., (N. S.), 1201, 1205; 67 Atl., 36]:

“There is no question about the principle that a false representation in a trade-mark will prevent equitable relief for its protection. *** To afford protection to a trade-mark containing a false representation would perpetuate the falsehood by the decree of the court.”

Uri v. Hirsch, 123 Fed., 568, 579:

“Indeed, it seems to me that it would be a travesty upon justice if, in the progress of the hearing of the case presented by the bill, the fact should be disclosed that the complainant himself, in his trade-mark as registered, or in his labels, placards, and advertisements, was making false representations in pushing his goods on the market, the Chancellor, sitting in the forum of conscience, should fail to turn him out of court. The prayer for an injunction is denied, and the bill is dismissed.”

B.—CONCRETE ILLUSTRATIONS OF APPLICATION OF PRINCIPLE.

Bear Lithia Springs Co. v. Great Bear Springs Co.
71 N. J. Equity, 596-601; (71 Atlantic, 383):

“The defendant also interposes as a reason why relief should not be afforded to the complainant that it does not come into court with clean hands. It was shown that on all of the labels used on carbonated water by the complainant is the statement that the water is ‘bottled at the springs.’ This statement was proven to be untrue. The water is not bottled at the springs, but is brought from the springs in large glass lined tank cars to New York City, where it is siphoned by a pipe or hose into a tank in the warehouse, and from thence bottled. The complainant seeks to meet this charge by the argument that, as they bring the water from the springs in glass lined tanks, for all essential purposes it is bottled at the springs. This argument does not appeal to me, if there is any merit in having the water put in bottles at the springs, and that there is merit is to be inferred from the fact that the complainant keeps that statement constantly before the eyes of its purchasers. In my judgment this statement is material in inducing the public to purchase what the complainant offers for sale. It may be fanciful, it may be that just as good results are reached by bringing the water in glass lined car tanks and bottling it in New York City as if it was bottled at the springs; but the purpose of the advertisement is to induce the sale of the water, and when the public are buying portable water because they suppose it to be bottled at the source or spring, and thus kept pure and less subject to contamination, and therefore more healthful than that furnished through the ordinary public water supply or other local sources, they have a right to be furnished with what it is represented to them they are buying, and it does not answer the pur-

pose to be told that some other method of bottling is just as good. The complainant, during the progress of the trial, when this point was made by the defendant, gave orders to discontinue the use of the labels containing the false statement, but in my judgment repentance came too late to be entitled to any consideration in the determination of this cause. The condition existed when the bill of complaint was filed and the discontinuance of the misrepresentation when discovered and exposed is entitled to but little consideration in determining the bona fides of complainant's position when it applied for equitable assistance. ***

"The question is thus presented, Do such representations justify this court in refusing the relief asked for? In considering this question I disregard all claims of the complainant to the effect that the defendant has been guilty of like conduct, without passing upon the question whether such conduct has been proven, for the complainant is the supplicant for aid, and it is its position, and not that of the defendant, which must be established to be such as to appeal to a court of conscience. In cases of this class, the complainant, to be entitled to equitable relief, must show an honest property right in the trade-mark or label for which he is seeking protection, and the rule is well settled that, if the commodity which the complainant is selling under a trade name, trade-mark, or symbol, is offered to the public under a misrepresentation or falsehood, he has no standing in a court of equity, nor can he successfully call upon that court to aid him in preserving to him the right to deceive the public without interruption. *Manhattan Co. v. Wood*, 108 U. S. 218; *Worden v. California Fig Co.*

102 Fed. Rep. 334, and cases there cited and discussed. ***

“The doctrine that the complainant must come into the court for relief, in causes of this class, with clean hands, and that, if any misrepresentation is used by the complainant to enhance the sale of his product, it will induce the court to withhold its decree, is so well supported by the authorities that a citation of them is unnecessary.

“This complainant has advertised its water as bottled at the spring. The ordinary and proper interpretation of this language, and the one intended to be conveyed by the complainant, is that the water in the bottle upon which the label is pasted was put in that bottle at the spring, and thus kept free from any possible contamination that might effect it during transportation to the buyer, and he is justified in relying upon that statement, a statement not true, and known to the complainant to be false.

“In *Krause v Peebles & Son*, 58 Fed Rep., 585-594, Judge Taft said: ‘The manifest advantage which “distillery bottling” has in the bottled whiskey trade arises from the improbability that a distiller, bottling whiskey at his own distillery warehouse, would bottle any whiskey but that which he has distilled,’ and he refused the injunction upon the ground that this advertisement was a misrepresentation. The argument used by Judge Taft applies with equal force to water, and bottling it in a warehouse in New York City is not bottling it at the spring. ***

“The care with which all courts have protected the public against imposition, so far as they have had the power, should be rigorously exercised ***

and the court should hasten to declare its determination not to aid in its perpetration.

“There will be a decree dismissing the bill of complainant.”

Dadiran v. Yacubian, 98 Fed., 872, 876, (“C. C. A.”—), Putnam, Cir. J.:

“These facts, of course, make a very strong prima facie case for the complainant; so that neither justice to him, nor the interests of the public, will permit the denial of the relief which he asks, unless legal principles clearly require it. ***

“Turning back to the complainant’s trade-mark registration, its leading element is that it states its ‘essential feature is the arbitrarily selected word symbol “Matzoon.”’ Accompanying the application was a fac simile of the label as ‘generally’ arranged, as to which the application said the word ‘Matzoon’ is printed in a straight line, with immediately below it the words, ‘or fermented milk food.’ *** In accordance with the statute the application further stated that the class of merchandise to which the trade-mark had been appropriated was medicinal preparations, and that a more particular description would be ‘a medicinal beverage consisting of a fluid preparation of fermented milk,’ ‘especially adapted as a nutritious food for invalids,’ (etc). ***

“The substantial defense rests on the proposition that the word ‘Matzoon’ is not an arbitrarily selected word symbol, but that the complainant’s article of merchandise is a historically and locally well known Armenian healthful beverage, containing certain medicinal qualities of which ‘Matzoon’ is the proper Armenian descriptive word. ***

“The most important underlying principles of the law of trade-marks, in their modern development, are largely ethical, and it is well settled that the rule that one who seeks equity must come into court with clean hands is peculiarly applicable to a complainant in a suit of the class at bar. For illustration, so far as the rule condemns misrepresentations as to the nature or origin of articles, made in, or in connection with, the trade-marks by the aid of which the articles seek a market, it is sufficient to refer to *Medicine Company v. Wood*, 108 U. S., 218; 2 Sup. Ct. Rep., 436; 27 L. Ed., 706; *Church v. Proctor*, 13 C. C. A., 426; 66 Fed., 240; *Syrup Co. v. Putnam*, 16 C. C. A., 376; 69 Fed., 740, and *Leather Cloth Company v. American Leather Cloth Co.*, 11 H. L. Cas., 523, affirming the views of Lord Westbury hereafter referred to. The rule is not limited to misrepresentations made by the trade-mark itself, but it covers whatever is substantially calculated to deceive the public if used in such connection that it becomes one of the essential forces which made the trade-mark successful. A comprehensive statement of the rule was made by Lord Westbury in *Leather Cloth Co. v. American Leather Cloth Company*, 4 De Gex, J. & S., 137, 142, as follows:

“ ‘When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in the business connected with it, be himself guilty of any false or misleading representations; for, if the plaintiff himself makes false representations in connection with the property he seeks to protect, he loses, and very justly,

his right to claim the assistance of a court of equity.’

“This citation from Lord Westbury is accepted by the latest authority (Sebastian’s Law of Trade-marks [1899] at page 207, and the rule is so well settled that there can be no doubt on this score. ***

“It is to be noted in this connection that the court is not bound to inquire whether or not the representations are false, in the obnoxious sense of the word, because it is sufficient that they are in their nature misleading, if they are also material, and do in fact mislead. Indeed, that the public are equally prejudiced by deceptive statements in a trade-mark, or in connection therewith, whether the purpose of its owner was fraudulent or not; that, therefore, the equity courts have no occasion to inquire into his secret intents; and that such courts will not protect a business built up as the result of deceptive representations, whatever were these secret intents,—are such fundamental rules in the law of trade-marks that we have no occasion to elaborate them or to cite authorities in reference to them, except so far as proper to illustrate them; and the case at bar runs clearly counter to these rules, whatever may be the proper transliteration of the Armenian word, and whether or not the article which the complainant has been selling is in substance the same as the product commonly known in Armenia as ‘Matzoon,’ or whether or not, as alleged in the complainant’s bill, ‘it is a new article of manufacture.’ *** We state this conclusion without intending to pass judgment on any question of the complainant’s integrity, and without refusing to accept the explanations made at bar, because a business based on a trade-mark which the equity courts are asked to protect, cannot, as we have said,

be built up in this way. The result is the dilemma stated by Mr. Sebastain in his work already cited, at page 351, omitting his reference to particular provisions of statute which are not necessary for this purpose:

“ ‘The applicant is in the dilemma that the alleged trade-mark is either descriptive or deceptive. If the word or words are properly applicable to the article, and may be truly used with respect to it, they are descriptive. If they may be read as stating something with respect to the article which is untrue, they are deceptive. So that *quacunque via* the application must fail.’ ***

“ ‘The decree of the circuit court (which dismissed the bill) is affirmed.’ ”

Allan B. Wrisley Company v. Iowa Soap Company,
104 Fed., 548, 551:

“ ‘There is another matter that ought, in my opinion, to defeat the right of plaintiff to the injunction herein. *** It was admitted in the argument by counsel for complainant that Allan B. Wrisley is an American citizen, residing at Chicago, Ill., and that the corporation comes before the court with a soap by the name of ‘Old Country Soap.’ I have no doubt whatever that the purpose of plaintiff is to make the people in a German community believe that its soap is made in Germany, or at least from a recipe coming from that country; and in an English community that it is a soap manufactured in England, or at least from a recipe coming from England; and so on in all other communities having a foreign population. One of plaintiff’s advertisements, used in the argument by consent of parties, tends to show that such is plaintiff’s purpose;

and yet, the fact is that plaintiff's soap is made in Chicago, Ill., and is manufactured by an Illinois corporation, as successor of Mr. Wrisley, an American citizen. * * * Plaintiff does not come into court with the right to maintain its action in thus practicing this deception."

Solis Cigar Company v. Pozo, 16 Col., 388 (25 Am. St. Rep., 279, 284; 26 Pac., 556):

"That the representations made by the trade-mark [of the plaintiff] as to the materials of which the cigars were made are of the sort which the law says must be absolutely truthful, where its protection is sought, there can be no question. They are of what is by all the authorities recognized as the substance of the device. Such words are used to lead the public to believe that the article sold possesses certain qualities known to belong to such material. They are used to influence the public to buy because of the public taste for such things. It seems clear that, under the proof, this case is brought within the full scope and application of this principle. The word 'Habana' must be taken as part of the trade-mark which the plaintiff wants protected. It is on a conspicuous part of the label. It is in large, bold-faced type, to catch the eye of the purchaser. It is evidently designed to attract his attention. Like the other words, it is in Spanish, and commonly used in the country where that sort of tobacco is grown. The whole purpose of the manufacturer was evidently to lead the public to believe that the cigar was made of that tobacco which is so much sought after and preferred by the smoking public. Yet it is not wholly true. The plaintiff admitted that the cigars sold under that

brand were made of Havana filler, seed binder, and Sumatra wrapper. Nothing but the filler came legitimately within the definition of Havana tobacco. *** Such a course is in contravention of the principles observed by courts of equity in the administration of this branch of the law. These courts have adopted rules which are designed to rebuke fraud, and encourage fair dealings with the public. Judged by these rules, as they have been communicated and applied, this case has no standing in court, and the bill was properly dismissed."

Coleman, Burden & Warthen Co. v. Dennenburg Co., 103 Ga., 784 (30 S. E., 639; 68 Am. St. Rep., 143; 41 L. R. A., 470), Simmons, Ch. J. :

"We have carefully considered the record and are satisfied that the court did not err in dismissing the action. It is a well recognized principle of equitable jurisprudence that he who comes into equity must come with clean hands. No person is entitled to equitable relief in a case where it is shown that his action is founded upon a matter in which his conduct is deceiving or is calculated to deceive the public. On the subject of trade-marks the rule as to misrepresentations by the plaintiff seems to be well settled. *** In the present case the trade-mark placed upon the shoes of the plaintiff represents such shoes to have been made by the Old Colony Co., Rockland, Mass. The evidence shows that there was no such company, and that the shoes were made, not at Rockland, but at another place, and by the Commonwealth Shoe & Leather Co. The trade-mark of the plaintiff is therefore a misrepresentation, which is calculated to deceive the public. *** Under the rulings of the above cited cases,

which are decisive of the question, we think that the plaintiff is not entitled to any relief in a court of equity against one who uses the same deceptive trade-mark on the same character of goods."

Laird v. Wilder, 9 Bush (Ky.), 131, (15 Am. Rep. 707, 711), Hardin, Ch. J.:

"We cannot doubt from the evidence that the design of bottle and the label used by the appellees were unwarrantedly adopted by them to mislead the public by inducing the belief that the compound prepared and sold by them was identical with that of the appellant; and we are of the opinion that the imitation was so nearly exact as to be well calculated to produce that effect. *** We would certainly adjudge that the appellant was entitled to relief, if his case appeared to be in other respects a meritorious one. ***

"We are constrained to conclude that the appellant, in putting his compound on the market as he did, with his express as well as his implied assurance to the public that it was 'free from all mineral and poisonous substances,' deliberately engaged in the perpetration of a fraud, which in a court of equity should be rebuked rather than upheld or protected. To a party thus presenting himself, a court of equity, adhering to the maxim that 'he who asks equity must come with pure hands,' will not lend its aid when the object to be effected is to secure him the exclusive privilege of deceiving the public in a particular way, although in so doing it might prevent another equally guilty from committing the same wrong."

Hilson Company v. Foster, 80 Fed., 896, 897, 899, 900, 901:

“No one can read the record without being convinced that the defendants started out with the deliberate purpose to cut into the complainant’s trade, occupy its territory, beguile its customers, and share its profits. The purpose to injure the complainant, if not admitted, is hardly disguised. The defendants have used the same means to introduce their cigars, and, although there is not exact identity at any point, there is similarity at every point. ***

“The defendants assert that after Foster had retired and the Hilson Company began business under its present management, it stated falsely that cigars made wholly and partly of domestic tobacco were genuine Havana cigars. It will be observed that the language used by the complainant is free from all doubt and ambiguity. The card says, ‘We use only the very best grade of Havana tobacco. *** We manufacture only genuine Havana cigars. *** Our cigars are guaranteed choice Havana tobacco, not American tobacco raised from Spanish seed.’ *** The complainant admits that ‘Hoffman House Boquet’ cigars are made with Havana filler, seed binders and Sumatra wrappers; that they have, to a considerable extent, been manufactured by team work; and that they have never been manufactured exclusively of Havana tobacco. *** Upon these conceded facts, is the complainant’s representation true? Assume that an ordinary smoker goes to the complainant’s factory to purchase ‘Hoffman House’ cigars, and that a box is handed to him by the president of the company with the oral statement: ‘These cigars are guaranteed choice Havana tobacco; we make only genuine Havana cigars and use

only the best grades of Havana tobacco;' would not the purchaser be justified in believing that he was purchasing cigars made 'only' of Havana tobacco? How much stronger language could be employed?

"It is no answer to this defense to say that the defendant Foster knew of the way in which the 'Hoffman House' cigars were manufactured. There is nothing fraudulent in the way they are made; the fraud consists in representing them to be what they are not. ***

"There is no escape from the finding of fact that the complainant has sold large quantities of seed cigars, or cigars with mixed fillers, representing them to be genuine Havana cigars. The rule of law applicable to such circumstances is perfectly clear. Equity will refuse to aid a complainant, in cases of this character, who is himself guilty of making false statements in connection with the property he seeks to protect. *** It would seem that this rule might be modified so as to permit the courts, for the protection of the general public, to enjoin both parties; but, so long as it remains the rule of the Supreme Court, it is the duty of inferior tribunals to follow it. The bill must be dismissed."

Memphis Keely Institute v. Leslie E. Keely Company,
155 Fed., 964, 966, 974 ("C. C. A."-6):

"It is not disputed that appellee represents to the public that gold is the principle ingredient and effective agent in its remedies. So distinct, repeated, and emphatic has been and is its representation to this effect that it must be held that its business has been built up and is being maintained by this representation. The name which it has given its reme-

dies, and by which they are known, is the 'Double Chloride Gold Cure.' There is no such substance as the 'Double Chloride of Gold.' There is a chloride of gold and a chloride of sodium. The claim was that these two substances were ingredients of the remedies, and, to voice the claim, the short form of 'Double Chloride of Gold' was adopted. *** The uncleanness here has to do with the very thing which the court is asked to protect and prevent from injury and invasion by appellants. The appellee claims to have the right to administer and to sell for administration, in the State of Tennessee, its Keely remedies, and that appellants are injuring that right and invading its business, by asserting that it has the right and is in fact administering such remedies at the Memphis Institute, and asks the court to protect its right and business from such injury and invasion by enjoining the appellants from so claiming, cancelling the contract, and requiring a delivery up of the remedy held by appellants. But that business,—the very thing which the court is asked to protect,—is, as we have held, unclean in the particular stated. Hence it is a clear case within the rule that a court of equity will not aid one who comes before it with unclean hands.

"It should be noted, however, that it is not relied on, either by the lower court or by the appellee's counsel here, that the fact in regard to appellee's fraudulent misrepresentation, as we have adjudged it, was not set up by the appellants in their answer as a defense to the suit. This presents the question whether, in the absence of its having been so presented, any effect can be given to it. It seems to be well settled that such a matter need not be pleaded as a defense to the suit. If it appears from

the record, it will be given effect, notwithstanding it has not been pleaded. The theory upon which this is done is that in reality it is not a matter of defense. It is given effect to, not on defendant's account, but because of the public. As said by the Supreme Court of Tennessee in the case of *Simmons Medicine Company v. Drug Company*, 93 Tenn., 99; (23 S. W., 169):

“‘It is not, strictly speaking, a defense at all, but rather an interposition by the court to discourage fraud and wrong upon the public.’ ***

“In view of the holding that we have made as to this matter, it is not necessary that we consider any other question raised and discussed on the appeal. We feel constrained, therefore, to adjudge that the decree of the lower court be reversed, and the cause remanded thereto, with directions to dismiss the bill.”

Palmer v. Harris, 60 Pa. St., 156; (100 Am. Dec., 557):

“The plaintiff, according to the statements of his bill, is the manufacturer of a cigar known as the ‘Golden Crown,’ and he devised a trade-mark which he uses in its sale. He charges that the defendant, who is a printer by trade, has counterfeited this mark, and sells copies of it to persons engaged in the manufacture and sale of cigars, by whom they are used to his damage. The answer of the defendant admits these allegations, but sets up as a ground for the non-interference of the court that the articles thus sold by the plaintiff were manufactured in the City of New York, and that the trade-mark in question contains upon it the declaration that they are the product of a ‘factory of cigars

from the best plantations *de la vuelta Abajo, Calle del Agua, Habana.* The case having been heard on bill and answer, the bill was dismissed, with costs.

“The maxim which is generally expressed, ‘He who comes into equity must come with clean hands,’ (Snell’s Principles, 33) but sometimes in stronger language, ‘He that hath committed inequity shall not have equity’ (Francis’s Maxims, 5) has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. The ground on which the jurisdiction of equity in such cases is rested is the promotion on honesty and fair dealing, because no one has a right to sell his own goods as the goods of another. (*Croft v. Day*, 7 Beav., 84) ‘It is perfectly manifest,’ said Lord Langdale, ‘that to do this is a fraud, and a very gross fraud.’ It is plain that there is no class of cases to which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade-mark which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal constituted to administer equity for the purpose of securing to him the profits arising from his fraudulent acts. *** It is not necessary that any one has been actually deceived or defrauded; it is enough that it [the mark used by the plaintiff] is a misrepresentation calculated to have that effect on the unwary and unsuspecting. Decree affirmed.”

Hazlett v. Pollack Stogie Company, 188 Fed., 494-496:

“Without imputing to complainant any bad faith or intent to deceive the public, we are of the opinion that, under the facts stated, the law forbids the maintenance of his bill. One of the essentials of an enforcable trade-mark right is that the goods it represents shall in no way mislead the public. *** The facts of the present case bring it within these rules. *** On the authority of these cases, and in view of the facts referred to, it is clear that this bill cannot be sustained. We deem it proper to expressly say that the absence of conditions to warrant sustaining the complainant’s bill, and not the existence of any merit on the part of respondent’s case, leads to our dismissal; for it should be added that the proofs in the case show *** a flagrant and shameless case of pirating an established business.”

Ginter v. Kinney Tobacco Co., et. al., 12 Fed., 782:

“The complainant advertises his tobacco as ‘straight cut,’ ‘curly cut,’ etc. *** In a circular of May, 1881, he states that his ‘straight cut tobaccos are cut from the choicest varieties of Virginia gold and sun cured leaf, and are cut to lie straight in the boxes and are very desirable for making cigarettes.’ He now admits that the term was selected, and has been employed by his business predecessors and himself, as an arbitrary designation of his particular article, and that neither his cigarettes nor the defendants’ are made of straight cut tobacco. All this, if true, does not help the complainant’s case, but, to the contrary, furnishes an additional reason why he should be denied the assistance of a court of

equity. Not only has he employed a name to which he could not acquire an exclusive right, but he has used it in a manner calculated to mislead the public, although, perhaps, not intentionally on his part. A purchaser cognizant of the differences in the preparation of smoking tobacco would legitimately infer that the complainant's cigarettes were in fact made of straight cut tobacco. No principles are better settled in the law of trade-marks than that a generic term, or a name merely descriptive of the ingredients, quality, or characteristics of an article of trade cannot be the subject of a trade-mark, and that the use of a name or term which is likely to deceive the public in reference to the components or nature of the article to which it is applied will not be tolerated."

American Cereal Company v. Eli Pettijohn Cereal Company, 72 Fed., 903, 907, (Showalter, Cir. J.):

"Whatever ought to be the ruling as to the matters already spoken of, there is another point in the case which seems to me decisive. Rolled wheat is an article made at divers mills in this country. Each mill appears to mark its own product by its own peculiar markings. Each mill, in this way, preserves the identity of its own product, and commends it to the public,—in other words, retains its own patronage and good will. Several of these mills, as already stated,—two, at least, in Ohio, one in Chicago, and one in Iowa,—are owned by complainant. After the destruction of the Pettijohn Mill at Minneapolis, complainant ceased to manufacture in that city. As already mentioned, it thenceforth supplied the patronage of the Min-

neapolis mill with the products of the mills in Ohio, at Chicago, and in Iowa. It used the same boxes and wrappers as had been used at the Minnesota mill, but left off the words "Minneapolis, Minn." without specifying any other place, or indicating in any manner the mill from which the product came. The machinery brought from California and used up to the fire, in making the 'Pettijohn California Breakfast Food,' was sold, as has already been stated, to defendant, and by defendant was, and apparently is still, used to make the rolled wheat now called 'Eli Pettijohn's Best.' The specific complaint is that the public buy the latter product believing that complainant's mill is still running at Minneapolis, and that said product is made by complainant at said mill; in other words, so far as the good will bought by complainant from the Pettijohn Breakfast Food Company depends on the belief by the trading public that said product is still made at the original Pettijohn Mill in Minnesota, defendant trespasses on the same. It may be that the rolled wheat produced at complainant's mills at Akron, Ohio, for instance, is just as good as, or even better than, that made by William A. Pettijohn and his successors at the original Pettijohn Mill in Minneapolis. But the product of the mill at Akron, Ohio, is not the product of the Pettijohn Mill at Minneapolis. It is not the 'Pettijohn California Breakfast Food,' as understood in the trade up to the time when the good will of the Minneapolis mill was purchased by complainant. A court of chancery cannot preserve for complainant the benefit of an impression on the trading public which no longer has any basis of fact. I cannot declare a right in complainant to have people con-

tinue in the belief that the 'Pettijohn's California Breakfast Food' now marketed by it is made at a Minneapolis mill. The injunction is dissolved, and, in view of this ruling and of the circumstances of the case, the contempt proceedings may be dismissed."

W. A. Gaines & Co. v. Turner Liquor Co., 204 Fed., 553, 556 ("C. C. A."-6), Knappen, Cir. J.:

"It is urged that if it be conceded that complainant has a valid trade-mark, and that defendant has infringed it, yet complainant has itself been guilty of misleading representations in the business use of its trade-mark, and, therefore, is not in a position to obtain relief from a court of equity, as coming into court with unclean hands. The misleading representations relied on are: *** (e).—That certain of complainant's labels bore the statement that the whiskey was manufactured,—

" 'in the sour mash fire copper way, being singled and doubled in copper stills over open wood fires.'"

"As to misrepresentation (e): The terms 'singled' and 'doubled' refer to the first and second boilings. It is established that the first boiling is done by steam, and that the second boiling is done over a wood fire, not open, but in a closed furnace. We cannot say that this is an immaterial misrepresentation. While whiskey singled and doubled over open wood fires may not be superior to that obtained by the process employed by complainant, the record indicates that many users of whiskey think that the open fire process is superior, and so might well be misled and deceived by this misrepresentation.

“Taking the whole case together, we are impressed that *** the case is thus brought within the rule of ‘unclean hands.’ We are not satisfied that complainant had discontinued all the misleading representations, and the decree of the circuit court must therefore be affirmed. ***

“On petition for rehearing.—In the opinion filed March 7th, last, it is said (speaking of the representation that complainant’s whiskey was ‘singled and doubled in copper stills over open wood fires’) that:

“ ‘The record indicates that many users of whiskey think that the open fire process is superior, and might well be misled and deceived by this misrepresentation.’

“A reference to the record now made fails to disclose such evidence and the statement in that regard is apparantly an error. This mistake does not, however, justify a rehearing, because, first, the representation in question was not the only respect in which complainant was held to offend; and, second, in the absence of evidence to the contrary (and we find no such evidence), it is to be presumed, from the fact that the representation was made, that a portion at least of the public was expected to regard it as material, and, if so, we cannot say, upon this record, that it was immaterial.”

c.—PARALLEL CASES.

Clothworthy v. Schepp, 42 Fed., 62, 63, (Lacombe, J.):

“The complainant himself is engaged in deceiving the very public whom he claims to protect from the deception of others. He calls his preparation

'Fruit' Puddine. In nine different places on his package this word 'Fruit' is repeated, as descriptive of the article, and a dish of fruit (pears, grapes, etc.) is most prominently depicted on one face of each package. His packages plainly suggest that fruit of some kind enters in some shape into his compound. A chemical analysis produced by the defendants, the substantial accuracy of which is not disputed, discloses the fact that his 'Puddine' is composed exclusively of corn starch, a small amount of saccharine matter, and a flavoring extract, with a little carmine added to give it color; it contains no fruit in any form. Under these circumstances, complainant's rights are not sufficiently clear to warrant the granting of a preliminary injunction. *Fetridge v. Wells*, 4 Abb. Pr., 144, approved in *Medicine Co. v. Wood*, 108 U. S., 218; 2 Sup. Ct. Rep., 436."

In *Leach v. Scharff*, 188 Fed., 446, 447, plaintiff called its remedy for coughs, colds, etc., "Oil of Pine," and the suit was to enjoin infringement of the name and unfair competition. (Kohlsaatt, Circuit Judge):

"It appears from the record that there is such an article as oil of pine, that complainant's article has no appreciable amount of any oil of pine in it, and that it is mainly liquified resin. *** While complainant's use of the name is undoubtedly original and fanciful as applied to his compound, it yet describes an actual pharmaceutical article of trade, and is therefore descriptive. This being so, complainant confronts the dilemma either of perpetrating a fraud on the public by claiming the presence of any oil of pine as an ingredient on the one hand, or, on the other hand, of claiming a trade-mark in the

mere proper pharmaceutical designation of the drug or compound he seeks to protect. In either case, a court of equity is not open to him, nor is it to his administratrix, and the suit must be dismissed for want of equity. The infringement complained of is plain and palpable and does not commend itself to the court. Under the facts of the case, as now presented, the court can grant no relief."

The "Syrup of Figs" cases are so closely analogous to the case at bar, that (except for the fact that the defendants in those cases were unquestionably guilty of unfair competition) they furnish almost exact parallels, and so justify a more extended reference to them. The plaintiff in this case is guilty of the same sort of fraud and misrepresentation exactly as deprived the plaintiff in those cases of all relief.

California Fig Syrup Co. v. Putnam, et. al., 66 Fed., 750, (Colt, Circuit Judge):

"The plaintiff claims a trade-mark in the words 'Syrup of Figs,' or 'Fig Syrup,' and seeks to enjoin their use by the defendants. *** If this preparation is in fact a syrup of figs, the words are clearly descriptive and not the proper subject of a trade-mark. Upon this point the contention of the plaintiff is that its preparation is not a syrup of figs, since it contains only a very small percentage of the juice of the fig; that the laxative ingredient is senna; that while the fig in the form of fruit may have laxative properties arising from the seeds and skin, the fig in the form of a syrup is no more laxative than any other fruit syrup; that it follows from these facts that these words, as applied to this com-

pound, are not descriptive but purely fanciful, and therefore constitute a valid trade-mark. The evidence shows that the compound is not a syrup of figs. It might more properly be termed a 'syrup of senna' if the words were intended to be descriptive of the article. But, assuming this is not a syrup of figs, we are met with the inquiry whether these words, as applied to this preparation, are not deceptive. The label on every bottle reads as follows: 'Syrup of Figs. The California Liquid Fruit Remedy. Gentle and Effective.' On the sides of each bottle are blown the words 'Syrup of Figs,' and on the back the words 'California Fig Sryup Co., San Francisco, California.' On the face of every package is a picture of a branch of a fig tree, with the hanging fruit, surrounded with the words, 'California Fig Syrup, San Francisco, California;' and, beneath this, the words: "Syrup of Figs" presents in the most elegant form the laxative and nutritious juice of the figs of California.' ***

"The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will not permit of any such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless, but it is a representation

which goes to the very essence of the plaintiff's right to a trade-mark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances."

The Court then quoted at length from *Leather Cloth Co. v. American Leather Cloth Co.*, *supra*; *Medicine Co. v. Wood*, *supra*; *Clotheworthy v. Schepp*, *supra*; *Connell v. Reed*, *supra*; *Siegert v. Abbott*, *supra*; *Krauss v. Jos. R. Peeples' Sons Co.*, *supra*; and *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, *supra*, after which is proceeded:

"In *Alden v. Cross*, 25 Mo. App., 123, 128, 130, a trade-mark was claimed in the words 'Fruit Vinegar.' In that case the court says:

" 'The vinegar thus branded was not manufactured out of fruit, in the plain, ordinary, usual sense of that term, but out of low wines distilled from cereals, and fruit enters into its composition only to a very insignificant extent. *** It would be a novel application of the rule governing the subject of trade-marks if one who manufactures vinegar out of cereals could appropriate for the article thus manufactured the word "Fruit" and thereby exclude another from using the word as descriptive of an article which is, in point of fact, manufactured out of fruit. *** But whether the word "Fruit," in this connection, is purely indicative of the character or quality of the article or not, the plaintiff's exclusive claim to it must fail on the further ground that the use of the word, in that connection, is clearly deceptive.' ***

"In *Seabury v. Grosvenor*, 14 Blatchf., 262, 263, Fed. Cas. No. 12,576, the word 'Capcine' was sought

to be appropriated as a trade-mark. In that case Mr. Justice Blatchford says:

“ ‘A registered trade-mark is claimed in the word “Capcine.” Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under such representations as those above cited, if they are false. It is shown that there is no such article as “Capcine” known in chemistry or medicine or otherwise. The authorities are clear that, in a case of this description, a plaintiff loses his right to claim the assistance of a court of equity.’ ***

“In *Manufacturing Co. v. Beeshore*, 8 C. C. A., 215; 59 Fed., 572, 574, a trade-mark was claimed in the words ‘One Night Cough Cure.’ In delivering the opinion of the court, Mr. Justice Shiras says:

“ ‘In the present case the so-called trade-mark “One Night Cough Cure” asserts a manifest falsehood or physiological impossibility. A cough or cold, so far seated as to require medical treatment, cannot be cured in a single night, and a pretense to the contrary is obviously an imposition on the ignorant.’

“In *Fetridge v. Wells*, 13 How. Pr., 385, 390, 393, the plaintiff sold a soap under the name of ‘Balm of a Thousand Flowers.’ In denying the plaintiff’s right to the exclusive use of these words as a trade-mark, Judge Duer says:

“ ‘I am fully convinced that the name “Balm of a Thousand Flowers” was invented, and is now used, to convey to the minds of purchasers the assurance that the highly scented liquid to which the name is given is, in truth, an extract or distillation from flowers, and, therefore, not merely an innocent, but

a pleasant and salutary preparation. Not only is this the meaning that the words used naturally suggest, but in my opinion it is that which they actually and plainly express, and were designed to convey. *** Let it not be said that it is of little consequence whether this representation be true or false. No representation can be more material than that of the ingredients of a compound which is recommended and sold as a medicine. 'There is none that is so likely to induce confidence in the application and use of the compound, and none that, when false, will more probably be attended with injurious, and perhaps fatal, consequences.'

"In *Schmidt v. Brieg*, 100 Cal., 672, 678; 35 Pac., 623, the Supreme Court of California, in a case where a trade-mark was claimed in the words 'Sarsaparilla and Iron,' says:

" 'We think the words "Sarsaparilla and Iron" are generic terms and were used for the purpose of indicating, not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself. *** The words "Sarsaparilla and Iron" describe ingredients well known to the public. *** But it is claimed by respondents (plaintiff below) that the words "Sarsaparilla and Iron" do not, in fact, indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of sarsaparilla, and a small quantity of iron, and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive; but it is sufficient to say in answer to this claim that the name given to the article is either generic, or it is of such a character that it

can as well be applied to defendant's beverage as to the plaintiff's.'

"In *Phalon v. Wright*, 5 Philadelphia, 464, 467, the subject of the trade-mark was 'Extract of Night-Blooming Cereus.' In that case the court says:

" 'They (the plaintiffs) admit that the name is a deception, as far as it is used to indicate the real character of the compound; that the perfume is not an extract from the flower, and that the trade-mark is, in that respect, a pure invention. The "Night-Blooming Cereus," however, exists. There is a flower well known by that name, which, when introduced to the public notice, excited much attention. An extract may be made from that flower; any perfumer has the right to make such an extract and to call it what it is, by the name of the flower.'

This case was affirmed by the Circuit Court of Appeals for the First Circuit, 69 Fed., 740, the court saying:

"We agree with the reasoning and the conclusions of the Circuit Court in this cause. *** It is sufficient to refer to *Medicine Co. v. Wood*, 108 U. S., 218; 2 Sup. Ct. Rep., 436, and to the underlying principles of *Church v. Proctor*, 13 C. C. A., 426; 66 Fed., 240, decided by this court February 2, 1895, as supporting the line of reasoning found in that opinion. The decree of the circuit court is affirmed."

Church v. Proctor, 66 Fed., 240, 244 ("C. C. A."-1):

"The defense of public policy does not proceed so much upon the idea of relief to the defendant as protection to the public, by withholding legal rem-

edy from a party contemplating or practicing imposition. *** The wholesome and salutary maxim '*Ex turpa causa non oritur actio*' has been so far enlarged that it may now be said that the law will not afford a remedy to a wrong doer in a scheme to deceive and defraud the public, and this modern doctrine does not depend upon the consideration of the innocence, or lack of innocence, of the party who seeks to interpose the objection. It becomes a defense, and may be interposed, whenever the fraud is discovered. *** Humanity is entitled to know what it buys and consumes. Government is instituted and maintained, and law is administered, for the protection of the people; and justice, influenced by enlightened public policy and controlled by legal principles, requires that contracts shall not be upheld and enforced for the benefit of a wrong doer, where the subject-matter thereof is designed to be used in furtherance of a business enterprise which contemplates imposition upon the general public through false, misleading and deceptive brands and labels, placed upon sealed packages of food products in a manner calculated to deceive, and forward the sale of such articles for what they are not."

California Fig Syrup Co. v. Stearns, 67 Fed., 1009:

"This is a bill in equity seeking to restrain the use by the defendant of the words 'Fig Syrup,' which, it is claimed, is an invasion of the rights of the complainant, who is engaged in the manufacture and sale of a preparation which it denominates 'Syrup of Figs. The California Liquid Fruit Remedy. Gentle and Effective.' ***

"The pith of the grievance alleged is the use by

defendant on its bottles and packages of the name 'Fig Syrup,' or 'Laxative Fig Syrup,' which, it is claimed, is but a colorable imitation of the name 'Syrup of Figs' given to complainant's manufacture, and which the latter claims has become the trade name of its preparation. The two questions therefore are: (1) Are the words 'Syrup of Figs,' or 'Fig Syrup,' a valid trade-mark? (2) If they are a valid trade-mark, has the complainant, by misrepresentation and deceit, lost its right to protection for such trade-mark? More briefly yet, the questions may be stated thus, as well said upon the argument, and as pleaded in the answer of the defendant: (1) Are the words 'Syrup of Figs,' or 'Fig Syrup,' a descriptive name? and (2) are they, under the proof, deceptive?

"1.—It is well settled that words 'which are memely descriptive of the character, qualities, or composition of an article' cannot be monopolized as a trade-mark. *Chemical Co. v. Meyer*, 139 U. S., 540; 11 Sup. Ct., 625; *Corbin v. Gould*, 133 U. S., 308; 10 Sup. Ct., 312; *Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S., 598; 9 Sup. Ct., 166; *Caswell v. Davis*, 58 N. Y., 223; *Canal Co. v. Clark*, 13 Wall., 311. In *Canal Co. v. Clark*, *supra*, the court lays down two negative essentials of a valid trade-mark, and it is there stated:

" 'No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed.'

"So, too, no one has a right to appropriate a sign

or a symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and, therefore, have an equal right to employ for the same purpose. If, therefore, the words 'Syrup of Figs,' or 'Fig Syrup,' are truly descriptive of the manufacture of both complainant and defendant, they cannot be sustained as a valid trade-mark, for it is not claimed, of course, that complainant has the exclusive right to make syrup from figs. The word 'syrup,' which is claimed as an essential part of the alleged trade-mark, is defined by Webster, as, 'a thick and viscid liquid, made from the juice of fruits, herbs, etc., boiled with sugar.' The Standard Dictionary defines 'syrup,' generally, as 'a thick, sweet liquid,' and, specifically, as 'a saturated solution of sugar in water, often combined with some medicinal substance, or flavored, as with the juice of fruits, for use in confections, cookery, or the preparation of beverages,' and adds, 'Syrups are commonly named from their source of flavoring.' It is evident from these definitions that they afford a wide range of manufacture, and that the word 'syrup' is necessarily qualified by that of the substance, or one or more of the substances, which distinguish it to the taste or in its medicinal property. The use of the word 'syrup' thus characterized is evidenced by the large number of commercial syrups, each of which is named from that ingredient which gives it flavor or character. Similar instances of its use and connection with other ingredients from which the particular compound is named are rhubarb, maple, lemon, and other familiar preparations employed in cookery, medicine, and for other purposes. That the term 'Fig Syrup' is descriptive, is also apparent from the

testimony of the complainant's witnesses, Pinniger, Underhill, and others, who substantially admit that it is intended to describe one of the constituents of the preparation. This appears also from the fact that on the bottle the article is termed a 'Fruit Remedy,' which is an unmistakable reference to the only fruit mentioned in the name of the complainant's compound. The well understood import of such names as 'Maple Syrup,' or the ordinary medicinal syrups, is that the prefix denominates the general term, points to the composition of the article, and indicates its principal or dominating ingredient which either gives it flavor or medicinal qualities. This nomenclature, so well known in pharmacy, if applied to complainant's preparation, can, therefore, have but one meaning, and necessarily affirms that the base or essential principle of the article is figs. If the right to use the word 'Syrup of Figs' or 'Fig Syrup,' is exclusive in the complainant, other persons cannot engage in making or selling such syrup, notwithstanding the fact that either of these names might with equal truth be employed by others whose manufactures may even excel complainant's in quality. If this be true, the public would be injured, for competition would be destroyed and the quality of the article debased. It would also result that any other syrup with any basal constituent, flavoring or medicinal, would come within the monopoly of the first appropriator of its name. This cannot be maintained. The names 'Fig Syrup,' and 'Syrup of Figs,' are not designed to indicate *per se* the owner or producer of the preparation and distinguish it from like articles made by others, but were intended, and serve to indicate, even if truthfully used, its quality and

composition, and fail to distinguish it from like articles made by others and cannot be sustained as a valid trade name. *Chemical Co. v. Meyer*, 139 U. S., 540; 11 Sup. Ct., 625; *Mill Co. v. Alcorn*, 150 U. S., 460; 14 Sup. Ct., 151; *Goodyear's India-Rubber Mfg. Co. v. Goodyear Rubber Company*, 128 U. S., 598; 9 Sup. Ct., 166; *Caswell v. Davis*, 58 N. Y., 230; *Gilman v. Hunnewell*, 122 Mass., 148.

"2. Is the name 'Syrup of Figs,' as used by complainant, deceptive? *** The testimony of Queen, who originated this compound, relative to its composition, is as follows:

" 'The juice of the fig enters into the combination, or, rather, so much of the soluble part, or so much as we can obtain of the soluble part, of the figs, enters into the combination by our method of treating the same in a largely diluted liquid form. Q. Then, when you state that you use a hundred pounds of figs to one thousand gallons of the mixture, you mean, I presume, the soluble portion produced from the one hundred pounds of figs? A. Yes, sir. Q. You don't mean to say that you utilize the entire one hundred pounds? A. No, sir, we get rid of the seed and rind, and possibly of some of the pulpy matter. Q. So that the mixture of one thousand gallons would have but one gallon of this substance from the fig? A. Yes, sir, I say one; it might possibly be two, but I don't think it would amount to more than that. Q. Might possibly be less than one gallon? A. Possibly, if the fig happens to be very dry and hard, and more of the seeds and less of the soluble matter than usual.'

"He further says: 'I have made experiments at different times, so as to form some intelligent opin-

ion as to the quantity of the soluble part of the fig obtained, but we consider that quantity of figs in the combination as unimportant, and consequently do not endeavor to get the exact amount every time,' and that if he was 'to make it exactly the same, without putting in any fig juice,' it would still have the same purpose, effect, and flavor, and be of the same color and appearance and be just as good a medicine, without as with the figs. ***

"It is apparent from these facts that if the equities of the parties are dependent upon the quantity of fig juice which enters into their respective preparations, they largely preponderate in favor of the defendant. It is equally apparent that complainant makes and sells its wares to the public under the representation that the active and controlling ingredient is derived from the fig, while in fact, under its own proof, the juice of that fruit has no medicinal value, and is lacking in the potency required for a laxative. The main objects sought to be secured by the protection of trade-marks are the protection of the public against the purchase of inferior articles in the belief that they are a product or manufacture of a maker or dealer in whom they repose confidence and whose goods alone they desire to purchase; and, second, to secure to the person who has first adopted and used a particular trade name, under which he has sold his wares, the profit he might make by the sale of the goods for which his skill and integrity have obtained a reputation. *Mfg. Co. v. Trainor*, 101 U. S., 51. It is a condition, however, of equitable relief to one who applies for the protection of his trade-mark, that the complainant should come into court with clean hands. The case of *Leather Cloth Company v.*

American Leather Cloth Co., 11 H. L. Cas., 523, states the principle upon which such relief is administered, as follows:

“ ‘When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representations; for if the plaintiff himself makes false statements in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity. Again, where a symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it; or, in other words, the right to the exclusive use of it cannot be maintained.’

“This case is freely quoted and approved in the case of *Medicine Co. v. Wood*, 108 U. S., 218; 2 Sup. Ct., 436. The same doctrine is tersely put in the quotation in the last mentioned case from *Fetridge v. Wells*, 4 Abb. Pr., 144:

“ ‘Those who come into a court of equity seeking equity must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be re-

quired to aid or sanction. To do so would be to forfeit its name and character.'

"The doctrine of these cases is of special application to the position of complainant. *** Queen, whose testimony has also been referred to, in explaining the reason for the name given to complainant's compound, admits that in its selection 'probably the wish to have the benefit of the popular impression that figs are laxative in large quantities, knowing that at the same time we can use the name in a fanciful sense because of the fact that figs do not act as a laxative in medicinal doses, might have influenced me.' To the same effect as to the popular impression created by the name is the testimony of Redington, Pinniger, Hummel, Love, and Fitch, who are each called by complainant. There can be no doubt, therefore, either that the complainant's preparation is not in fact compounded of the juice of the fig, but its principle is senna, or that its name was adopted, and is used, for the purpose of trading upon the popular fallacy that the juice of the fig in medicinal doses is an effectual remedy for constipation,—an impression which is admitted to be without foundation,—or that the ordinary purchaser buys the compound as and for the fruit remedy which it is advertised and asserted to be. The law applicable to this state of facts is as clear as their purpose and effect. It will not lend its aid to foster the delusion of the public or countenance the deceit. The authorities on this point are harmonious. *** The relief prayed for by complainant is in truth the privilege of selling its preparation of senna under the name of 'Fig Syrup.' Whatever the virtues or popularity of the complainant's specific, there is no ground on which such

relief can be granted. *** The bill of complaint is dismissed with costs."

In affirming this case (73 Fed., 814, 816; "C. C. A."-6) the Circuit Court of Appeals for the 6th Circuit said (Taft, Circuit Judge):

"Counsel for the appellee contends that the decree of the court below must be sustained on two grounds: First, that the complainant and appellant cannot appropriate as a trade-mark the term 'Syrup of Figs' because it is a descriptive term and relates to the composition of the article which it is used to designate; and, second, that the complainant cannot have relief in a court of equity, because, in using the name to designate the preparation which it sells, it is guilty of a distinct misrepresentation to the public, which has a tendency to mislead the public into buying the article with a false impression in respect to its manufacture and its composition. ***

" 'Syrup of Figs' is a descriptive term. It may be that no one had ever made a syrup of figs at the time that Queen selected the term to designate the preparation which he put upon the market. That is immaterial. It is entirely possible to describe something by the use of common words which may never have had a commercial use, or which may never have been in fact made. *** It is manifest that the term 'Syrup of Figs,' used to describe a medicinal preparation, has a distinct and definite meaning, namely, a combination of sugar and the juice of the fig, and possibly other ingredients, in which, however, the medicinal property of the fig is the active and chief element. *** The term

'Syrup of Figs' therefore cannot be used as a trade-mark.

"But it is well settled that, even if the complainant is using something to designate its article which it cannot claim to have the exclusive right to use as a trade-mark, yet, if it can show to the court that the defendant is selling an article like the complainant's in such a way as to induce the public to believe that defendant's article is the complainant's, and that it is doing this intentionally and fraudulently, the complainant may have the relief of a court of equity by injunction to prevent such piracy. Thus, in this case, even though 'Syrup of Figs' is such a descriptive term that it cannot be used as a trade-mark, yet if the defendant here put its medicinal preparation up in packages ornamented and dressed so as to be a colorable imitation of the complainant's package, with the intention of misleading the public into the purchase of the defendant's article as the complainant's, then, undoubtedly, the defendant might be enjoined from thus attempting to palm off its article as the article of complainant. * * *

"In this case there is evidence tending to show that the defendant is attempting to appropriate to itself by unfair means the good name which the preparation of the complainant has acquired by advertising and use among the public at large. Witnesses who are retail druggists testified that the defendant's agents visited them, and recommended the sale of defendant's article on the ground that the druggist could palm off defendant's article as complainant's article upon intending purchasers who were not familiar with complainant's package, and who called only for 'Syrup of Figs,' intending

thereby to purchase the complainant's article. The defendant reduces the price of its article very considerably in order to induce druggists to take this course. We are not prepared to say, therefore, that the complainant might not, except for the reason about to be stated, be entitled to some relief by injunction against the defendant to prevent unfair competition.

"2. But the second ground presented, and that upon which the court below rested its decision, prevents the complainant from having any relief at all. That ground is that the complainant has built up its business and made it valuable by an intentional deceit of the public. It has intended the public to understand that the preparation which it sells has, as an important medicinal agent in its composition, the juice of California Figs. This has undoubtedly led the public into the purchase of the preparation. The statement is wholly untrue. Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character, or even its flavor, but merely to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public. It is true it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of, and is dependent upon, such deceit. It is well settled that if a person wishes a trade-mark to be protected by a court of equity he must come into court with clean hands, and if it appears that the trade-mark for which he seeks protection is itself a misrepresenta-

tion to the public, and has acquired a value with the public by fraudulent misrepresentation in advertisements, all relief will be denied to him. This is the doctrine of the highest court of England, and no court has laid it down with greater stringency than the Supreme Court of the United States. *** The decree of the court below is affirmed, with costs."

In California Fig Syrup Co. v. Worden, 95 Fed., 132, the Circuit Court for the Northern District of California concluded that the complainant was entitled to an injunction on the ground of unfair competition, and enjoined the defendant from selling, or offering for sale, a liquid laxative medicine under the name of "Syrup of Figs," or "Fig Syrup," or under any name in colorable imitation of the name "Syrup of Figs."

On appeal to this court (*Clinton E. Worden Co. v. California Fig Syrup Co.*, 102 Fed., 334, 336 ["C. C. A."-9]) the decision was affirmed, Circuit Judge Ross dissenting. Circuit Judge Gilbert, who delivered the opinion, took the view that this case was distinguishable from *California Fig Syrup Company v. Stearns*, and *California Fig Syrup Company v. Putnam*, *supra*, in respect to the defense of unclean hands. He said:

"The two decisions so cited from the First and Sixth Circuits were based upon facts which differ in material respects from the facts upon which the decree was rendered in the case at bar. In those cases it was shown that the appellee's fig syrup was offered to the public under the representation that it contained the laxative and nutritious juice of the

figs of California, and the preparation was designated 'The California Liquid Fruit Remedy,' whereas, in fact, it was shown that there never had been in the preparation more than one-tenth of one per cent. of the juice of figs,—a quantity so small as to have no perceptible effect either medicinally or by way of flavor. The record in the present case shows that, after the decisions in those cases were rendered, the appellee made material alterations in the representations which were printed on the cartons and boxes enclosing its remedy, and in its new label eliminated the representations which had controlled decisions in the cases referred to, and that in lieu thereof it set forth the following representations:

“ ‘This excellent remedy presents in a most acceptable form the medicinally laxative principles of plants known to act most beneficially, to cleanse the system effectually, to permanently overcome habitual constipation and the many ills dependent on it, etc. The juice of figs in the combination is to promote the pleasant taste. ’ ”

“It is by these representations so offered to the public that the right of appellee in the present case must be measured. It is urged that there still remains the false representation which is suggested by the name of the preparation which is thus offered for sale. It is said that the name 'Syrup of Figs' is a false name; it declares to the public that the preparation is composed of a liquid decoction of figs; that, therefore, it is calculated to deceive the public. It is argued that if the name does in fact properly designate the preparation, it is not susceptible of appropriation as a trade-mark, and that, if it does not in fact properly designate the

preparation, it is deceptive and therefore not entitled to protection in a court of equity. The first horn of the dilemma so presented may be disregarded. The appellee's medicinal preparation is not a syrup of figs. It is not made from figs, and the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect, either in promoting the pleasant taste or otherwise. It is shown, also, that there is known to the drug trade no such preparation as a syrup of figs, and that appellee's grantor was the first to use the name. We do not think the name 'Syrup of Figs' as applied to the appellee's preparation, is in itself calculated to mislead or deceive the public to any material extent. Any one who knows enough to take medicine when he is ill must know that a liquid medicine to be taken in small doses as a laxative would be worthless for the purpose intended if it consisted of nothing more than a syrup or decoction of figs. There is in the form in which the medicine is presented, the purpose for which it is used, and the size of the dose which is prescribed, sufficient to charge him with notice that the medicine contains something more than a preparation of figs. And if, indeed, he be so ignorant and uninformed that the name of 'Syrup of Figs' alone conveys to him the impression that the compound is made of figs, there may be found in the carton a distinct intimation to the contrary. It is there declared that 'the remedy presents in the most acceptable form the medicinally laxative principles of plants known to act beneficially,' and that the juice of the figs in the combination is only to promote the pleasant taste. As the name 'Syrup of Figs' is used by the complainant, it is a fanciful name only.

The equities of the case are not effected either for or against the appellee by the use of the very small quantity of figs which enter into the preparation of its medicine.”

This case was finally carried to the Supreme Court of the United States (*Worden v. California Fig Syrup Co.*, 187 U. S., 517; 47 L. Ed., 282), where the decisions of both this court and the circuit court were reversed, and the cause remanded with instructions to dismiss the bill. Mr. Justice Shiras, in delivering the opinion, said:

“The courts below concluded, upon the evidence, that the defendants sold a medicinal preparation named, marked, and packed in imitation of the complainant’s medicine, for the purpose, and with the design and intent, of deceiving purchasers and inducing them to buy defendants’ preparation instead of the complainant’s. We see no reason to dissent from that conclusion, and, if there were no other questions in the case, we should be ready to affirm the decree, awarding a perpetual injunction and an accounting of the profits and gains derived from such unfair and dishonest practices.

“Another ground, however, is urged against the the complainant’s right to invoke the aid of a court of equity, in that the California Fig Syrup Co., the complainant, has so fraudulently represented to the public the nature of its medical preparation that it is not entitled to equitable relief.

“Some courts have gone so far as to hold that courts of equity will not interfere by injunction in controversies between rival manufacturers and dealers in so-called quack medicines. *** We find, however, more solidity in the contention on behalf

of appellants that when the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark, or in his advertisements and business, be himself guilty of any false or misleading representations; that if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses his right to claim the assistance of a court of equity; that where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed in it, or, in other words, the right to the exclusive use of it cannot be maintained.

“Among the cases cited to sustain this contention are the following:”

The court then reviewed the cases exhaustively, and quoted extensively with approval from those above referred to, at the conclusion of which it proceeded:

“The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that, when the term is used to designate a laxative medicine, it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used is to be determined.

“The counsel of the appellee in the present case do not contend that the courts of the second and

sixth circuits were wrong in denying the complainant any relief upon the cases as presented in those courts. They do contend that those cases were argued upon a wrong theory by the counsel for the complainant. The language of the brief in this regard is as follows:

“ ‘Here was where complainant made a mistake. Acting under advice of able counsel, it claimed the name “Syrup of Figs” to be a technical *trade-mark*, when all that was necessary to claim was that it constituted a *trade name*. Able counsel in the second and sixth circuits pressed injunction suits against infringers on the theory that the complainant had a trade-mark in the name, **and that the** statements on the cartons and bottles were immaterial. He did not address himself to showing that the name “Syrup of Figs” came to be **honestly and** properly applied to the product as largely descriptive of the ingredients of the medicine. He was so afraid of ruining his case as a case of trade-marks, by showing that it was descriptive, that he did not prove what was proved in the case now at bar, viz: that figs were, at the time the name was given, an important part of the composition.’

“We are not much impressed with the force of this attempted distinction. Even if it were true that, at the time the medicine in question was first made and put upon the market, the juice of figs was so largely used as one of the ingredients as to have warranted the adoption of the name ‘Syrup of Figs’ as descriptive of the nature of the medicine, that would be no justification for continuing the use of the term after the manufacturers and vendors of the medicine ceased to use fig juice as a material ingredient. Even if the term was honestly applied

in the first instance, as descriptive, it would none the less be deceptive and misleading when, as is shown in the present case, it ceased to be a truthful statement of the nature of the compound. Nor are we disposed to concede that, under the evidence in the present case, the term 'Syrup of Figs,' or 'Fig Syrup,' was properly used as descriptive of the nature of the medicine when it was first made. Then, as now, the operative laxative element was senna, and the addition of the fig juice was, at the best, experimental, and apparently was intended to attract the patronage of the public by holding out the name of the medicine as 'Syrup of Figs.'

"However that may be, it is now admitted that the use of figs was found to be deleterious, and that their use, as a substantial or material ingredient, was abandoned. ***

"That the complainant company, years after it had established a popular demand for its product, issued statements in medical journals and newspapers and circulars that the medical properties of their compound were derived from senna, does not relieve it from the charge of deceit and misrepresentation to the public. *** 'The company, by the use of the terms of its so-called trade-mark on its bottles, wrappers, and cartons continued to appeal to the consumers out of whose credulity came the profits of their business. And, indeed, it was the imitation by the defendants of such false and misleading representations that led to the present suit.

"The bill in the present case contains the following allegations:

" 'Your orator further states that this laxative medical compound or preparation, made and put up as aforesaid by your orator, has always been mark-

ed, named, and called by your orator, "Syrup of Figs," being advertised by your orator under that name, the name "Syrup of Figs," printed or otherwise marked upon every bottle of this preparation made and sold by your orator,—this name being also printed upon the boxes, packages or wrappers in which the bottles of this preparation are packed for shipment and sale; that it has been the practice of your orator to put the bottles containing this preparation in oblong pasteboard boxes or cartons, so that they will reach the consumer in that form; that in all instances, not only the bottle which contains this preparation, but the box or carton which contains the bottles of this preparation, is marked with the words "Syrup of Figs," and also contains printed matter stating that this preparation is a medical laxative preparation, and also giving a general idea of its uses and purposes. *** Your orator further states that it and its said predecessor in interest were the first to pack and dress or mark a liquid laxative preparation or medicine in the manner illustrated by exhibits "A" and "B,"—that is to say, in an oblong rectangular box or carton, with statements of the virtues of this preparation printed in different languages upon the back and sides of the carton, and having on the front of the carton and on the border, within which, at the top, is a representation of a branch of a fig tree, bearing fruit and leaves, surrounded by the words 'Fig Syrup Company,' or 'California Fig Syrup Company,' and below which appear in large letters, the words "Syrup of Figs."'

"Upon such allegations and the admissions of the complainant's principal witnesses, some of which are hereinbefore quoted, and upon the entire evi-

dence in the case, and in the light of the authorities cited by the counsel of the respective parties, our conclusions are that the name 'Syrup of Figs' does not, in fact, properly designate or describe the preparation made and sold by the California Fig Syrup Company so as to be susceptible of appropriation as a trade-mark, and that the marks and names used upon the bottles containing complainant's preparation, and upon the cartons and wrappers containing the bottles, are so plainly deceptive as to deprive the complainant company of a right to a remedy by way of an injunction by a court of equity.

"Accordingly, the decree of the Circuit Court of Appeals is reversed; and the decree of the Circuit Court is also reversed, and the cause is remanded to that court with directions to dismiss the bill of complainant."

III. THE EVIDENCE.

While the fraud of which plaintiff is guilty is perfectly plain from the evidence, it will lead to a much clearer understanding of that fraud to exhibit it as it stands revealed against the background of the past.

a.—THE DRUGS COCA AND COLA.

The *Erythroxylon coca* plant is a shrub of the Eastern Andes, and is cultivated extensively in Bolivia, Peru and Ecuador, and, to some extent, also, in other parts of South America, and in Central America, Mexico, India, and the West and East Indies, although relatively little of the commercial product originates outside of Peru, Bolivia and Ecuador. It is cultivated for the sake of its leaves, which are the only part of the plant of which any use is made. Cultivation is carried on on plantations in much the same manner as coffee, tea and tobacco are cultivated. The leaves, when fully grown, are picked by hand, dried in the sun, compressed into bales, sewn into rawhide, and, when thoroughly dried, are ready for transportation. The dried leaves are known commercially and scientifically as "coca,"¹ just as the dried leaves of the tea and tobacco plants are known commercially and scientifically as "tea" and "tobacco."

¹**"COCA.**—The dried leaves of a South American shrub (*Erythroxylon coca*) of the flax family, used in medicine as a tonic, and chewed by the native Indians as a nervine stimulant."—**FUNK & WAGNALLS NEW STANDARD DICTIONARY** (Funk & Wagnalls Company, New York and London, Editions 1913 and 1916), page 511.

"COCA.—A South American shrub (*Erythroxylon coca*); also its dried leaves, which are used as a powerful nerve stimulant and yield cocaine."—**WEBSTER'S NEW INTERNATIONAL DICTIONARY**, G. & C. Merriam Co., 1909), page 426.

"COCA.—(1) The dried leaves of *Erythroxylon coca*, of the family of Erythroxylaceae, a small shrub of the mountains of Peru and

Bolivia, but cultivated in other parts of South America. The principal source of the drug as a commercial product is the Province of Yungas, in Bolivia, where the bushes, which are grown on the sides or mountains, yield three crops a year. *** It is a stimulant bearing some resemblance in its effects to tea and coffee, and has long been used as a masticatory by the Indians of South America. **It relieves feelings of fatigue and hunger, and the difficulty of breathing experienced in climbing high mountains. The habit of chewing coca is an enslaving one. Coca is used in medicine as a tonic and stimulant; it yields the valuable alkaloid, cocaine.** (2) The plant itself."—**CENTURY DICTIONARY AND CYCLOPEDIA** (The Century Company, New York, 1913), Vol. 2, page 1073.

"COCA.—The dried leaves of a South American shrub, **Erythroxylon coca**, which grows from three to six feet in height, and is cultivated not only in South America, but in Ceylon, Java and India. The lanceolate leaves have a very pronounced midrib, a faintly aromatic and bitter taste, and furnish an important narcotic and stimulant. **Coca has been in use from a very remote period among the Indians of South America, and was extensively cultivated before the Spanish Conquest.** The dried leaves are chewed with a little finely powdered unslaked lime, or with the alkaline ashes of the quinoa, or certain other plants. An infusion is also occasionally used. An habitual coca-chewer takes a dose about four times daily. In soothing effect it resembles tobacco, but its influence is much more marked. It greatly lessens the desire for ordinary food, and at the same time permits of much more sustained exertion, even without sleep. It affects the nervous mechanism of respiration so that the difficulty of breathing so common in the ascent of long and steep slopes at high elevations is little felt. **Habitually chewed, the leaves ruin body and mind. An infusion, or a tincture in wine, is often prescribed by physicians as a tonic.** About 40,000,000 pounds of the leaves are exported annually from South America. **The chief value of coca consists in the alkaloid cocaine.** *** **The preparation of coca found in the United States Pharmacopoeia are: (1) coca, the dried leaves; (2) the fluid extract; (3) cocaine; (4) hydrochlorate of cocaine; (5) oleate of cocaine.**"—**NELSON'S ENCYCLOPEDIA**, Perpetual Loose Leaf Edition (Thomas Nelson & Sons, New York), Vol. 3, page 211.

"COCA.—The dried leaves of **Erythroxylon coca** Lamark (**Fam. Erythroxylaceae**), known commercially as Huanuco coca, or of **E. Truxillense** Rusby, known commercially as Truxillo coca, yielding, when assayed by the process given below, **not less than 0.5 per cent. of the ether-soluble alkaloids of coca [cocaine and derivatives].** *** —**The Pharmacopoeia of the United States, 8th Decennial Edition (Official from September 1st, 1905), p. 106.**

"COCA.—The dried leaves of **Erythroxylon coca** (Lamark). *** The coca plants are largely cultivated shrubs of the Eastern Andes, now introduced to some extent into other parts of tropical South America, Central America, Mexico, and the West and East Indies, although little of the commercial product originates outside of Peru, Bolivia and Ecuador. *** The leaves are picked by hand when fully grown, but before approaching closely the condition of falling. A plant yields two, sometimes three, harvests in a year. Although April and September yield the principal crops, yet picking is not confined to any season, going on continually upon different plantations. Sixty to eighty pounds per acre of dried leaves to a picking is a fair yield. The leaves are dried quickly, within two or three hours, in hot sunshine, and not the least moisture is allowed to reach them. After lying in a loose pile in the coca house for two or three days, they are again briefly exposed to the sun to dry off the perspiration which has developed, and are then powerfully compressed into bales, called 'cestos,' nominally twenty-five pounds each, but almost always short

in weight. The 'cestos' are then sewn into a rawhide, and, when this has thoroughly dried, are ready for transportation. *** **The history of coca is most intimately entwined with the religious, social, and even political, history of the people of Peru and adjacent countries, and has even left is permanent impression upon that of its conquerors.** (See Mortimer's *Peru, The History of Coca.*) This history is of great physiological interest, since coca is unquestionably the agent which has enabled the dwellers of the higher Andes not only to withstand the effects of a high elevation, but to become noted for their physical strength and endurance in spite of them. Deprived of its support, these abilities fail. Foreigners going there have found it possible to gain a similar assistance from its use, and to endure without distress physical trials which are otherwise unendurable. The natives chew the leaves several times during the day, the total daily amount being about half an ounce, remaining perfectly inactive while the operation is in progress. The leaf is commonly chewed with **llipta**, a mixture the chief ingredient of which is ashes, those from certain plants being preferred. Aside from the effect of flavoring the mass, very much as salt would do, it is not improbable that the alkali of the ashes brings about changes in the constituents, rendering them more active or more available to the system. *** The Indians of Peru and Bolivia employ an infusion of the leaves as a stomachic, stimulant, and mild diaphoretic. The leaves, mixed with ashes or lime, are chewed for the purpose of allaying hunger, appeasing thirst, preventing fatigue, and overcoming mental depression. **It has been generally stated that this habit produces utter mental and physical degradation in those persons.**—**NATIONAL STANDARD DISPENSATORY** (Lea Bros. & Co., Philadelphia, 1905), pages 444-448.

"COCA.—(Erythroxylon coca).—A plant of the natural order of **Erythroxylaceae**, the leaves of which are used as a stimulant in the western countries of South America. *** **In the Kew Bulletin for January, 1889, is an account of the history and botany of the plant, which has been so long under cultivation in South America that its original home is doubtful.** *** It has been estimated that coca is used by about 8,000,000 of the human race, being consumed in Bolivia, Peru, Ecuador, Columbia and Rio Negro. In Peru the Indians carry a leathern pouch for the leaves and a supply of pulverized unslaked lime, or a preparation of ashes of the quinoa plant, called **llipta** or **llucta**. Three or four times a day labor is suspended for **chacchor**, or **acullicar**, as the mastication of coca is termed. *** Two or three ounces of coca are thus consumed by each Indian. **Coca was used by the Peruvian Indians from the most ancient times. It was employed as an offering to the sun, or to produce smoke at the great sacrifices; and the priests, it was claimed, must chew it during the performance of religious ceremonies, otherwise the gods would not be propitiated.** Coca is still held in superstitious veneration among the Peruvians, and is believed by the miners of Cerro de Pasco, to soften the veins of ore if masticated and thrown upon them. *** **Excess in coca chewing leads in many cases to great bodily wasting, mental failure, insomnia, weakening of the circulation, and extreme dyspepsia.**—**ENCYCLOPOEDIA BRITANNICA**, 11th Edition (1910), Vol. 6, page 614.

"COCA.—(S. Amer. name), Erythroxylon coca.—A shrub of the natural order of **Erythroxylaceae**, of which the leaves are much used by the inhabitants of Peru and Bolivia as a narcotic and stimulant. The dried leaves are chewed with a little finely powdered unslaked lime, or with the alkaline of quinoa, or certain other plants. *** The properties and effects of coca resemble those of opium, although it is less narcotic. *** It also lessens the desire for ordinary food, and, for some time, at least, enables the person who uses it to endure greater and more protracted exertion than he otherwise could, and

DR. WILLIAM R. SIMONSON, of Cincinnati, (defendant's witness):

"The coca leaf is grown chiefly in Bolivia and Peru. It is the coca plant. It has been grown there for a very long time. *** It is as commonly used down there as tobacco and coffee and tea are used among ourselves. *** It is commonly employed by chewing." (Rec., 2510).

JOHN F. QUEENY, of St. Louis (plaintiff's witness):

"Coca leaves are obtained from South America. It is a shrub." (Rec., 934).

with less food. The leaves are sometimes mixed with forage for mules when especially long trips are taken. It is especially remarkable for its property of preventing the difficulty of respiration so common in the ascent of long and steep slopes at great elevations. But **when used habitually and in excess**, it weakens the digestion, produces biliary and other disorders, and finally **induces a miserable ruin of body and mind. It has been in use from a very remote period among the Indians of South America, and was extensively cultivated before the Spanish Conquest.** Many of the Indians of the Peruvian Andes are to this day addicted to it, and its use prevails also to a considerable extent among the other inhabitants of the same region. Its culture and use have extended into Brazil (See Cocaine). The shrub is extensively cultivated in various parts of South America and in Ceylon, India and Java. It could probably be grown in parts of Florida and California. *** The annual production of the leaves for South American trade is estimated at from thirty to fifty million pounds."—**THE NEW INTERNATIONAL ENCYCLOPOEDIA** (Dodd, Mead & Co., New York, 1913), Vol. 5, page 92.

"COCA.—(*Erythroxylon coca*.)—A shrubby plant belonging to the natural order of Erythroxylaceae, found wild in the mountainous regions of Peru and Bolivia. *** The leaves are gathered and dried in the sun and chewed with a little powdered chalk. When taken in some quantity they produce an intoxication like that of opium. **As the indulgence is repeated, the appetite increases, while that for all other forms of nourishment diminishes; the miserable victim loses all power of resisting his craving and becomes reduced to a condition of physical and mental prostration.** When used in moderation, **coca lessens the appetite for food** and enables those who have partaken of it to **sustain greater fatigue** than they otherwise could. It has been found the best preventive of asthmatic symptoms caused by rapid ascent of lofty mountains. An infusion of the leaves is also used with the same effect."—**THE AMERICANA** (The Americana Co., New York, 1917), Vol. 5.

JOHN W. ROSSITER, of Chicago (plaintiff's witness) :

"For a great many years Erythroxyton coca has been bought and sold on the market under the name of Erythroxyton coca, or coca leaves. The United States Pharmacopoeia names this product 'coca,' and it is known commercially as 'coca.'" (Rec., 935).

DR. JOHN A. WESENER, of Chicago (plaintiff's witness) :

"I think possibly it is true that coca was bought and sold commercially under the name 'coca' prior to 1886, and that, while they have in some instances used the name 'coca leaves,' the word 'coca' was used commercially in designating this product, or drug, or plant." (Rec., 924).

DR. H. C. FULLER, of Washington, D. C. (plaintiff's witness) :

"You ask if there are any substances known as 'coca' and 'cola' under their own distinctive names; well, they are well known drugs on the market,—coca leaves and cola nuts. The words 'coca' and 'cola' are used synonymously among the drug merchants,—used interchangeably." (Rec., 2374).

ASA G. CANDLER, President of the Coca-Cola Company :

"Q. These coca leaves, do they come from South America? A. Yes, sir. Q. How do they use them? A. Same way,—chew them. They are a very popular article in that country. Q. Plenty of them grow there? A. Yes, sir; they are gathered by peasants,

I understand. It is a tree; the same way with cola plants. Q. Mr. Candler, what are they chewed for, as compared with the way tobacco is taken, or tea is taken, or any stimulating drink,—strong drink? A. We are told they chew them about the same way. They can get hold of them easier than tobacco. They do not have to cultivate them. It is their native plant.” (*Rucker Rec.*, 263).

DR. CHARLES E. CASPARI, of St. Louis (plaintiff’s witness):

“*Plaintiff’s exhibit 193* is a bottle containing specimens of coca leaves.” (*Rec.*, 905).

DR. J. J. KESSLER, of St. Louis (defendant’s witness):

“I have a specimen of coca leaves here (showing bottle marked *defendant’s exhibit 232*). These are unground coca leaves which I purchased in St. Louis from Meyer Bros. Drug Co.” (*Rec.*, 2467).

Cola vera and *cola acuminata* are two varieties of trees that grow in tropical Africa, the West Indies, Brazil and various other tropical countries, and bear a nut or seed, which, when separated into its cotyledons, dried, and placed on the market, is known commercially and scientifically as “cola,” or “kola.” Cola is used by the natives as a muscular stimulant or supporter very much as coca is used in the Andes, and there is a very large domestic trade in it in Africa. The literature of its native use is quite extensive.²

²“COLA.—KOLA.—The recent or dried cotyledons of *cola vera*, or of *cola acuminata*. *** ORIGIN.—From good sized and handsome trees, natives of tropical Africa, and rather extensively cultivated in some other tropical countries, the second especially in the West In-

dies where it is quite extensively naturalized. The commercial supplies come from Africa and the West Indies. The West Indian are larger and better looking, but, according to Dohme's analysis, contain less caffeine. *** For drying, their cotyledons are separated and exposed to the sun. When thoroughly dried they can be easily and perfectly kept for any desired time. *** Kola is used by the natives as a muscular stimulant or supporter very much as coca is used in the Andes, and there is a very large domestic trade in it in Africa. The literature of its native use is now quite extensive. *** The dried kernels are usually separated into their cotyledons, which are halves or quarters of the above described bodies (seeds). *** They are heavy, hard and tough, the fractured surface light brown and minutely granular. **There is no odor, and they have merely a slight astringent taste.** Kola seeds contain. *** 1.5 to 3.6 per cent. total alkaloids. From 1-100 to 1-40 of this alkaloid is theobromine ($C_7H_8N_{402}$) and the rest is caffeine ($C_8H_{10}N_{402}$).—**NATIONAL STANDARD DISPENSATORY** (Lea Bros. & Co., Philadelphia, 1905).

"COLA.—(1) A small genus of tropical African trees of the Colanut family. *Cola acuminata*, bearing the **cola nut**, is the best known species, and has been naturalized in Brazil and the West Indies. (2) A tree of the genus. **COLA-NUT.**—The seed contain in the pod of the *cola acuminata*; said to have febrifugal and antiseptic qualities. When fresh, it is sweet and white or red; when dried, it is yellowish brown and bitter."—**FUNK & WAGNALLS NEW STANDARD DICTIONARY** (Funk & Wagnalls Co., New York & London, 1913-1916 Editions) p. 523.

"COLA.—A genus of African sterculiaceous trees, having *** a fruit containing large seeds, those of the *cola acuminata* being the **kola-nuts of commerce.**"—**WEBSTER'S NEW INTERNATIONAL DICTIONARY** (G. & C. Merriam, 1909) page 435.

"COLA-NUT.—A brownish, bitter seed of about the size of a chestnut produced by a tree of Western tropical Africa, *Bichea acuminata*, of the family Sterculiaceae. The tree has been naturalized in the West Indies and Brazil. The nuts are said to be used for purifying water, for quieting the cravings of hunger, and to increase the power of resisting fatigue from prolonged labor. They quickly counteract the effects of intoxication."—**CENTURY DICTIONARY AND CYCLOPAEDIA** (The Century Co., New York, 1913), Vol. 2, page 1095.

"COLA-NUT, or Kola-nut.—The seed,—not properly the nut,—of *cola acuminata*, a large tree of the natural of Sterculiaceae, native of Western Tropical Africa, cultivated in the West Indies, Brazil and other tropical countries where it has to some extent become naturalized. *** In the tropics, especially in the Sudan, where they are known as guru-nuts, they are employed as a stimulant, and as a remedy for tropical diarrhoea. **The nuts contain from 0.7 per cent. to 0.2 per cent. of the alkaloid caffeine, and a small amount of tannin and theobromine.** According to Keubel and to Hilger, **fresh cola nuts probably contain no caffeine at all, but a glucoside the fermentative decomposition of which yields caffeine, glucose and cola red.**"—**THE NEW INTERNATIONAL ENCYCLOPAEDIA** (Dodd, Mead & Co., New York, 1913), Vol. 5, page 129.

"KOLA, or Guru-nut.—The fruit of a tropical African tree, *Cola acuminata*, belonging to the order Sterculiaceae. The nuts are rather larger than walnuts, and have a very bitter taste. They contain a large quantity of caffeine, and are eaten by the native as a stimulant, which enables them to accomplish feats of endurance and also to stave off the demands of hunger."—**NELSON'S ENCYCLOPAEDIA** (Perpetual Loose Leaf Edition) (Thomas Nelson & Sons, New York), Vol. 7, page 143.

"COLA-NUT.—The seed of a tree (*Cola acuminata*) from 20 to 30 feet in height, belonging to the natural order (**Sterculiaceae**) whose

JOHN F. QUEENY, of St. Louis (plaintiff's witness):

"Cola nuts come from Africa and grown on a tree." (Rec., 924).

ASA G. CANDLER, president of the Coca-Cola Co.:

"Q. Where do they (cola-nuts) grow? A. In South Africa, where we get them. Q. On trees? A. Yes, sir; it belongs to the coffee genus. Comes from same style, except perennial growth. Q. What has it got in it? A. Caffeine. *** Q. What use are cola-nuts put to in Africa where they are grown? A. They are chewed, the natives chew them. They have a superstitious attachment for them and chew them. You may chew one yourself, but it is difficult. It is a hard nut. Q. How does it compare to tobacco? A. It is chewed about the same way." (*Rucker Rec.*, 262-263).

DR. CHARLES E. CASPARI, of St. Louis (plaintiff's witness):

"*Plaintiff's exhibit 194* is a bottle containing cola-nuts. These specimens show *** the whole cola nut." (Rec., 905).

DR. J. J. KESSLER, of St. Louis (defendant's witness):

habitat is a region of Western Africa stretching 500 miles from the coast into the interior between Sierra Leone and Lower Guinea. The tree has become naturalized in the West Indies and Brazil. It bears a profusion of purplish flowers. The flower yields a large brownish-yellow nut which enfolds in the same follicle the red and white seeds called Cola-Nuts. In its tenth year the tree reaches its gathered in October and November from the June flowering, and greatest fecundity, and then yields 120 pounds of seeds. They are again in May and June from the December flowering. **In the tropics the natives use the cola-nuts as a stimulant and for medicinal purposes,** and only recently has the nut passed from the narrow use of the aborigines into an extensive service of civilized man."—**THE AMERICANA** (The Americana Co., New York, 1917) Vol. 5.

“Cola nut is a hard, woody nut. When you chew the nut it tastes like so much hard-wood sawdust. *** (Shows bottle marked *defendant's exhibit 233*). This bottle contains ground kola nuts. It also contains a few of the half nuts which are covered by the [ground] kola nuts. It also contains a small phial of caffeine, which I extracted from the kola nuts.” (Rec., 2468).

Before the close of the Civil War scientists both here and abroad had made exhaustive research into the origin, history, constituents, and physiological effects of both coca and cola, and the results of their investigation had been published broadcast in the standard scientific works of that day.³

³THE UNITED STATES DISPENSATORY (WOOD & BACHE) 12th Edition, published by J. P. Lippincott & Co., at Philadelphia, in 1866 (pp. 1513, et seq.):

“*Erythroxylon coca* (Lamark).—Coca.—It is a shrub growing wild in South America, and largely cultivated in Bolivia for the sake of its leaves, which are much used in that country as a masticatory. The plant is propagated from seeds in nurseries, which begin to yield in eighteen months and continue productive for half a century. The leaves, on being picked, are dried in the sun, and then packed in bags. **They are known in South America by the name of coca.** This was in general use among the natives of Peru at the time of the Conquest, and has continued to be much employed until the present time. *** Some attempts were made to analyze coca before the publication of the 11th. Edition of this Dispensatory, of which the main results were that the leaves contained a peculiar bitter principle, resin, tannin, an aromatic principle, extractive, chlorophyll, a substance analogous to theine, and salts of lime. (**Journal de Pharm., Avril, 1859, p. 283.**) Dr. Albert Niemann, of Gaslor, has made a most thorough investigation of the leaves and succeeded in isolating a peculiar alkaloid to which he gave the name of *cocaina*. *** He also obtained wax, a variety of tannic acid (*cocatannic acid*) and a concrete volatile odorous substance. (See **Am. Journ. of Pharm., March, 1861, p. 122.**) Mr. Maisch, of Philadelphia, succeeded in obtaining from the leaves an uncrystallizable alkaloid having so nearly the properties of *cocaina* that he considered it merely as the result of the action of heat on the crystallizable principles. (**Ibid, November, 1861, p. 500.**) Still more recently M. Lasseu has examined *cocaina* and ascertained that it splits into benzoic acid and a new base which he calls *ecgonine*. *** (**Journ. de Pharm., Juin, 1862, p. 522.**)... According to Dr. Weddell coca produces a gentle excitation with an indisposition to sleep, in these respects resembling tea and coffee. It is asserted to support the strength for a considerable time in the absence of food, but it does not supply the place of nutriment, and,

By 1880, both coca and cola had become so well known as articles of commerce that they had found a place in the various dictionaries of commerce and manufacture.⁴

The chief value of coca is due to its predominant alkaloid, cocaine,⁵ and, similarly, the chief value of cola is due to its predominant alkaloid, caffeine.⁶

probably, in this respect also, acts like the two substances referred to. The Indians, while chewing it, pass whole days in traveling or working without food; but they nevertheless eat freely in the evening. Weddell states that persons unused to it are liable to unpleasant effects from its abuse; he has known instances of hallucinations apparently resulting from this cause. The natives chew it with some alkaline substance, as the ashes of certain plants, or lye. (Weddell, *Voyage dans le Nord de la Bolivie*.) In large quantities it is said to produce a general excitation of the circulatory and nervous systems, imparting increased vigor to the muscles as well as to the intellect, with an indescribable feeling of satisfaction amounting almost sometimes to a species of delirium. *** (Montegazza, *N. Am. Med.-Chir. Rev.*, March, 1860, p. 340.) A medium dose is from 3 to 4 drachms, taken in infusion. For the results of experiments on the physiological effects of coca by M. Reis, (See *Ann. de Therap.*, 1864, p. 118.)"

Ibid., p. 1605—

"STERCULTA ACUMINATA.—This is a large African tree, known as the source of the **kola nuts** of Guinea. As this page was going to press, we saw an announcement in the *Pharmaceutical Journal* (Feb., 1865, p. 407) that Dr. Daniell has discovered in these nuts a chrystallized alkaloid which he believes to be **theine**, or, as it is now generally called, **caffeine**. He was induced to make the examination by noticing that after taking a decoction of the seeds he was effected with long continued loss of sleep."

4**DICTIONARY OF COMMERCE & MANUFACTURE** (Estes & Laurote), Boston, 1880, p. 180:

"COCA.—The leaves of the *Erythroxylon coca*, a plant which is grown largely in Peru and Bolivia. The Bolivian coca is said to be superior to the Peruvian. The best kind is said to come from the Province of Yungas, and the most inferior product from Peru. The consumption of coca in Peru and Bolivia is enormous. In small doses it is supposed to act as a stimulant and aid digestion; in larger ones it is said to possess dangerous narcotic properties. The mountaineers of South America state that they are enabled to reach high elevations without difficulty in respiration, and to stave off the feeling of hunger by chewing the leaves during their ascent. Good quality coca should have its leaves unbroken, of a medium size, bright green color, and of an odor somewhat combining that of hay and chocolate. The taste is bitter."

Ibid., Vol. 3, p. 643:

"KOLA-NUTS.—Colas.—The brown seeds of *Sterculia acuminata*, about the size of a pigeon's egg, which are very highly esteemed in Africa."

5**"COCAINA.—Cocaine.**—An alkaloid ($C_{17}H_{21}NO_4$) obtained from the leaves of *Erythroxylon Coca* Lam."—**NATIONAL STANDARD DISPENSATORY** (Lea Bros. & Co., Philadelphia), p. 449.

"COCAINA.—Cocaine.—An alkaloid ($C_{17}H_{21}NO_4$) obtained from several varieties of coca."—**PHARMACOPOEIA OF THE UNITED**

STATES, 8th Decennial Edition, (Official from Sep. 1st, 1905), p. 107.

"COCAINE.—($C^{17}H^{21}NO^4$).—An alkaloid derived from coca leaves."—**THE NEW INTERNATIONAL ENCYCLOPAEDIA**, (Dodd, Meade Co., New York, 1913) Vol. 5, p. 92.

"COCAINE.—Cocaine is an alkaloid extracted from the leaves of *Erythroxylon coca* (See **Coca**), a shrub cultivated in the tropics of both hemispheres. *** **The chief value of coca consists in the alkaloid cocaine.**"—**NELSON'S ENCYCLOPAEDIA**, Perpetual Loose Leaf Edition (Thos. Nelson & Sons, New York), Vol. 3, p. 211.

"COCAINE.—A vegetable alkaloid with the chemical formula ($C^{17}H^{21}NO^4$) obtained from the leaves of the coca shrub (*Erythroxylon coca*) of South America."—**THE AMERICANA** (The Americana Co., New York, 1917), Vol. 5.

"Coca is used in medicine as a stimulant and tonic; it yields the valuable alkaloid, cocaine."—**CENTURY DICTIONARY & ENCYCLOPAEDIA**, (The Century Co., New York, 1913), Vol. 2, p. 1073.

"COCAINE.—The leaves of the coca plant grown in Peru and Bolivia contain cocaine, along with small quantities of other alkaloids. *** These alkaloids are present in the plants in very small quantities compared with cocaine, and have not been used therapeutically."—**PHARMACOLOGY & THERAPEUTICS, OR THE ACTION OF DRUGS**, (Cushny), (Lea & Bros. Co., Philadelphia and New York, 1906) p. 298.

"CAFFEINE.—The cola, or kola-nut (*Sterculia acuminata*) *** contains caffeine, with small quantities of theobromine." **PHARM. & THERAP., OR THE ACTION OF DRUGS** (Cushny), Lea Bros. & Co., New York, 1906, Title, "Caffeine."

"COLA-NUT.—The nuts contain from 0.7 per cent. to 0.2 per cent. of the alkaloid caffeine, and small amounts of tannin and theobromine."—**THE NEW INTERNATIONAL ENCYCLOPAEDIA** (Dodd, Meade & Co., New York, 1913), Vol. 5, p. 129.

"CAFFEINE.—An alkaloid ($C^8H^{10}N^4O^2$) crystalizing in slender silk-like needles which have a bitter taste, found in coffee beans. Coffee contains from 0.6 to 0.2 per cent. It is a weak base and forms salts with strong mineral acids. Caffeine and certain of its salts are used in medicine, and the stimulating effects of tea and coffee are largely due to the presence of this alkaloid. It is identical with theine found in tea, the guranin of *Paullinia*, Cupana, and the alkaloid of *Ilex Paraguayiensis*."—**THE CENTURY DICTIONARY & ENCYCLOPAEDIA**, (The Century Co., New York, 1913) Vol. 2, p. 755.

"THEINE.—A bitter crystallizable volatile principle ($C^8H^{10}N^4O^2$) found in tea and coffee and some other plants. Tea yields 2 to 4 per cent. It is conceded to be the principle which gives to tea its refreshing and gentle stimulant qualities. Same as caffeine."—**CENTURY DICTIONARY & ENCYCLOPAEDIA**, Vol. 2, p. 6271.

"CAFFEINE, or Theine.—($C^8H^{10}N^4O^2$).—A substance found in the leaves and beans of the coffee tree, in tea, in Paraguay tea, and in small quantities in coca and in the kola nuts."—**ENCYCLOPAEDIA BRITANNICA**, 11th. EDITION (1910), Vol. 4, p. 945.

"CAFFEINE, Theine, or Methyl Theobromine.—($C^8H^{10}N^4O^2$).—An alkaloid which forms the stimulating principle in coffee (where it amounts to 0.5 per cent.), in tea (where it forms from 2 to 4 per cent.) and in South American **mate** (a: infusion of the leave of *Ilex Paraguayensis*), and in the kola nut of Africa. *** It is obtained from a strong infusion of boiled tea."—**NELSON'S ENCYCLOPAEDIA**, Perpetual Loose Leaf Edition, Vol. 2, p. 431.

"CAFEINE.—Coffee, the use of which is derived from the Arabians, is a berry of *Coffee Arabica* and contains caffeine; tea, the leaves of *Thea Chinensis*, contains caffeine along with the theopylline. Cacao, cocoa, or chocolate, is derived from the seeds of the theobroma cacao, a tree indigenous to Brazil and Central America,

DR. JOHN A. WESENER, of Chicago (plaintiff's witness):

"The characteristic property of coca, or of the coca leaf, is due to its predominant alkaloid, cocaine. The characteristic property of cola, or cola nut, is caffeine and theobromine." (Rec., 928).

DR. C. A. MESERVE, of Tucson, Arizona (defendant's witness):

"The most important characteristic of the coca plant, apart from the ordinary constituents that you find in any plant life, is cocaine. That is the alkaloid." (Rec., 2465.)

DR. J. J. KESSLER, of St. Louis (defendant's witness):

"Cola nuts contain about $1\frac{1}{2}$ per cent. caffeine." (Rec., 2469.)

ASA G. CANDLER, president of the Coca-Cola Co.:

"(Mr. Hirsch: Mr. Candler, you can answer that question that he asked you a while ago,—go ahead and tell him what is the leading alkaloid contained in the coca leaf.) A. Cocaine, that is the leading alkaloid." (Rec., 384).

and contains theobromine. In Central Africa the cola, or kola nut (*Sterculia acuminata*) is used by the natives, and contains caffeine with small quantities of theobromine. In Brazil guarana paste is formed from the seeds of *Paullinia sorbilsis*, and contains caffeine and theobromine, while in the Argentina Republic Yerba mate or Paraguay tea (*Ilex Paraguayensis*) is used to form a beverage which contains a very small quantity of caffeine. Another species of *Ilex* is met with in Virginia and Carolina under the name of Apalache tea, or Youpon, and also contains caffeine. *** These three principles, caffeine, theobromine and theopylline *** all resemble each other in most points of their pharmacological action, although caffeine acts on the central nervous system as well as on the kidneys, muscles and heart, while theobromine has comparatively little effect on the last three."—**PHARMACOLOGY & THERAPEUTICS, OR THE ACTION OF DRUGS**, (Cushny) Lea Bros. & Co., Philadelphia and New York, 1906, Title "Caffeine."

DR. JOSEPH JACOBS, of Atlanta, (plaintiff's witness):

"Besides cocaine, coca leaves have in them extractive matter,—cocaine is the only thing of any importance." (Rec., 410).

SAMUEL C. DOBBS, vice-president and sales-manager of the Coca-Cola Company:

"Q. There is caffeine in the cola nuts? A. Yes, sir. *** Q. Are there other properties, Mr. Dobbs, that constitute cola nuts besides caffeine? A. There are three or four remote properties; theobromine is one, but I have forgotten the others. *** They are of no importance." (*Rucker Rec.*, 396).

PREPARATIONS OF COCA AND COLA THAT PRECEDED PLAINTIFF'S "COCA-COLA."

For a number of years prior to 1886 various concerns throughout the country manufactured and marketed in considerable quantities certain varieties of so-called "tonics," which were advertised extensively as "brain tonics," "nerve stimulants," and cure-alls "for all manner of nervous affections," from headache, neuralgia and hysteria, to melancholy, sterility and lost-manhood. Some of these were composed of the fluid extract of coca, others of the fluid extract of the cola, or caffeine, and still others of a compound or mixture of the two. Their chief claim to merit was due to their wonderfully exhilarating effect. This effect was produced by cocaine, the active principle and chief alkaloid of coca, or by caffeine, the active principle and chief alkaloid of cola, or by the combined potency of both drugs. These tonics were known and widely advertised by names descriptive

of their leading ingredients, such as "Wine of Coca," "Coca-Wine," "Coca-Malta," "Cola Cordial," "Kola-fra," etc., and generally contained a statement on the label of the active medicinal agents, together with pictorial representations of the plants, shrubs, trees, or nuts from which those drugs were derived.

Among these highly stimulating "tonics" was one known as "Pemberton's French Wine Coca," manufactured by a Dr. John Stith Pemberton, an old chemist of Atlanta, Ga., who was himself a cocaine fiend. (Rec., 1283). The label which he used on his bottles, and which he registered in the Patent Office May 19th, 1885, is in evidence as *defendant's exhibit 23*. This label tells what the article was.⁷ A photograph of the original label is shown on the opposite page.

⁷"Taken in moderate amount coca, or cocaine, produces a sense of exhilaration *** When taken internally, cocaine stimulates the central nervous system, but, unless the dose be poisonous, has little effect upon the sensory nerves. The drug in moderate doses stimulates the cerebrum, increasing the rapidity of thought, and acts as a stimulant to the medulla, increasing the number of respirations, and elevating the blood pressure. *** Under its administration the heart's action becomes more rapid and forcible, a condition which is probably due to the direct stimulation of the heart muscle or its accelerator nerve. *** Coca or cocaine is not largely employed in internal medicine, but may be given as a temporary stimulant during the typhoid state of the low fevers. While its physiological action would lead us to believe that it is an invaluable stimulant in cases of collapse, clinical experience has shown that it is not particularly useful under these circumstances, as it not infrequently produces untoward effects which are harmful in their character. Cocaine is said to be a good stimulant and anti-emetic in the treatment of yellow fever, and it enjoys an excellent reputation in the treatment of the vomiting during pregnancy, that following anaesthetization, and that accompanying acute gastric irritation. It has been employed in cases in which great mental or physical strain were to be borne, and in the treatment of the opium habit, but should be given cautiously lest the patient develop the cocaine habit. Coca has also been recommended in the treatment of hysteria, melancholia, and allied nervous conditions, but it is of little benefit in any of them. *** Because of the pleasant effects which cocaine produces when taken hypodermically or by the mouth, the cocaine habit is not rarely met with, many persons becoming slaves to the use of this drug. *** The nervous breakdown of the patient under the

PREPARED BY

COCA WINE!

The Marvellous Invigorator!

The Great Nerve Tonic!!

The Queen of Stimulants!!!

The Intellectual Beverage!!!!



COCA WINE exhilarates, invigorates, sustains and refreshes both body and brain!

THE RESTORER PAR EXCELLENCE!
Exhilarating and Stimulating all the Vital Functions without Reaction!!

The reconstructive, invigorating and health-restoring properties of the **COCA WINE** are truly wonderful, and exceed all other Tonics and stimulants.

Recommended for those recovering from the Opium and Morphine habits; also for all who are compelled to use a stimulant.

→ **PRICE \$1.00** ←

None genuine without signature of
J. S. PEMBERTON.

French

WINE COCA

IDEAL NERVE TONIC



STIMULANT.

ATLANTA, GA.

J. S. Pemberton

COCA WINE

IS A SCIENTIFIC COMBINATION

—OF THE—

Concentrated Extracts of Ephrazone, Cacao, Damiana and Kola Nut, with an excellent quality of Bordeaux Wine.

Especially Recommended for all Diseases where a Pure Nerve Tonic and Stimulant is Indicated,

such as Mental and Physical Exhaustion, Nervousness, Hysteria, Melancholy, Neuralgia, Sick-Headache, Indigestion, Gastric Irritability, Diarrhea, Gravel, Prostatitis, Constipation, Heart Disease, etc. Wine Coca strengthens and tones the Sexual Organs to all the vigor of youth, cures Sterility, Impotency, Spermatorrhea and imparts vitality to the genital organs. (Indispensable after Alcoholic excesses.) This agreeable and most efficacious of all Tonics and Stimulants, increases the secretion of gastric juices, gives appetite, sound digestion and refreshing sleep, makes every muscle stronger, the mind clear and strong, the entire body invigorated and refreshed.

DIRECTIONS.

ONE-BAF WINE GLASS FULL, half hour before each meal or immediately after meals. Delicate persons or children, two TABLE-SPOONFULS.

WINE COCA taken upon rising in the morning will relieve all uneasiness or bad feeling in the Stomach, and remove the languor to which so many persons are subject, and make you strong and bright for 24 hours work.

J. S. PEMBERTON & CO., Sole Prop'rs,

ATLANTA, GA.

continued use of this remedy is even more rapid than when morphine is abused.—**Pharmaceutical preparations:** Aromatic Wine of Coca, N. F.; Elixir of Coca, N. F.; Elixir of Coca and Guarana, N. F.; Fluid Extract of Coca, U. S. P.; Wine of Coca, N. F.”—NATIONAL STANDARD DISPENSATORY (Lea Bros. & Co., Philadelphia, 1905) p. 448-449.

“Administered by the mouth, cocaine is a nerve stimulant exciting respiration and circulation, removing the sense of fatigue, stimulating to muscular and mental effort, and deadening to the sense of hunger, although not affording any nutriment. The dangers of cocaine differ according to the different methods of administration. The stimulating effect which it produces on the brain tends to the formation of the cocaine habit,—as serious an addiction as morphinism or alcoholism. Among the natives of the region where the coca shrub is grown, it is said that once the habit of chewing the leaves is formed, it is never abandoned, and the nervous system is ruined thereby. It should be more widely known that **cocaine is the active principle in ‘Coca Wines,’** the drinking of which is said to have led to the formation of **the cocaine habit.**”—NELSON’S ENCYCLOPAEDIA, Perpetual Loose Leaf Edition (Thos. Nelson & Sons, New York), Vol. 3, p. 211. Title, “Cocaine.”

“The most important habit forming drugs are certain narcotics, such as opium and its derivatives, morphine, codeine and heroin; cocaine; and certain hypnotics, such as antipyrine, antifebrine, mebol, sulphonal, trional, veronal, etc., which are derived from coal tar. *** In the case of morphine and cocaine the diagnosis, or rather the detection, of the habit is not always easy in cases where the habit is concealed or unsuspected. The points to be noted are: The face becomes pallid and pasty, with anxiety, melancholy and distrust depicted thereon; the persons wants to be left alone, and so becomes unsociable and irritable; he is restless and shifty and loses the power of concentration and application to work. The appetite fails and actual gastric disturbance is frequent. He sleeps little and is not refreshed by sleep. *** No reliance whatever can be placed on the patients statements, as he acquires, by dint of the habit, the power of vigorous and sustained deception with, at times, considerable ingenuity. *** The cocaine habit is of more recent growth than that of morphine and it claims an increasing number of victims. Erlenmeyer has recently called it the third scourge of humanity. As an enslaving drug it is the most insidious, the most rapid in its conquest, the most demoralizing in its effects, and the most permanent in the marks it leaves on the patient should he long survive its use. **A common method of acquiring the habit** is by means of **medicated drinks and sweets, such as wines, coca, voice lozenges and the use of the nasal spray.**”—NELSON’S ENCYCLOPAEDIA, Perpetual Loose Leaf Edition, Vol. 4, p. 141. Title, “Drug Habits.”

“The principle constituents of coca are cocaine and several derivatives. *** **The common forms of administering** are in the **Wine of Coca, the fluid extract, and the alkaloid cocaine.** *** When used habitually and in excess, it weakens the digestion, and produces biliary and other disorders, and finally induces a miserable ruin of body and mind.”—THE NEW INTERNATIONAL ENCYCLOPAEDIA (Dodd, Meade & Co., New York, 1913), Vol. 5, p. 92. Title, “Coca.”

“When taken internally, cocaine is a mental stimulant, and moderate doses usually cause a pleasant sense of exhilaration and a temporary increase in mental and physical power. *** The sense of hunger and fatigue is lessened so that privations for the time being may be better endured under the influence of the drug.”—THE AMERICANA (The Americana Co., New York), Vol. 5. Title, “Cocaine.”

"COCAINE.—An alkaloid derived from coca leaves. *** The toxic dose varies greatly, some persons being unfavorably effected by small amounts. The only result may be restlessness and excitement, or it may be headache, rapid respirations, delirium, coma, or convulsions, with wide dilation of the pupils. Persons addicted to the cocaine habit use the drug internally and by hypodermic injection. Its prolonged use causes digestive disturbances, general weakness of mind and body, muscular twitching and insomnia."—THE NEW INTERNATIONAL ENCYCLOPAEDIA (Dodd, Meade & Co., New York) (1913), Vol. 5, p. 92. Title, "Cocaine."

"In Bulletin No. 393, published by the Department of Agriculture, Dr. Kebler states that the widespread development of the cocaine habit in the United States has been far more detrimental than the use of opium in China. While the statistics regarding this subject are by no means complete, they are sufficient to show that the use of cocaine in this country has already extended to a greater percentage of the people than has opium, even in China. Not only may the drug be obtained by itself, but **many patent medicines depend upon it for their effects.**"—THE AMERICANA (The Americana Co., New York, 1917) Vol. 5. Title, "Drug Habits."

"Since the introduction of cocaine into general therapeutic use, numerous cases of the formation of a habit similar to that of opium or morphine have been recorded. *** **A wine containing coca extract** is often used in domestic medicine as a 'general tonic,' and **has repeatedly given rise to the cocaine habit.**"—PHARMACOLOGY & THERAPEUTICS, OR THE ACTION OF DRUGS (Cushny), Lea Bros. & Co., Philadelphia and New York, 1906, p. 306, 309.

"DAMIANA.—The leaves of *Turnera diffusa aphrodisiaca*, a small yellow-flowered shrub growing from southwestern Texas through Mexico, especially the western and west central portions, to northern South America, and in some parts of the West Indies. *** **Constituents.**—Damiana yields 0.5 per cent. of an amber colored volatile oil with a heavy, aromatic odor and a warm, camphoraceous, bitter taste, light-brown amorphous bitter damianin, which is soluble in ether and chloroform, 6.4 per cent. of hard resin, 3.5 per cent. of tannin, soft resin, sugar and gum. **Pharmaceutical preparations.**—Elixir of Damiana, N. F.; Fluidextract of Damiana, N. F. **Action and uses.**—Damiana possesses the properties of a stimulant tonic, and in large quantities is laxative. As an aphrodisiac it is probably valueless, and it has no power to restore either the size or function of an atrophied testicle. It has been largely employed in sexual impotence, but as it is usually combined with phosphorus and nux vomica, it is quite probable that the benefit obtained is due to the latter remedies."—NATIONAL STANDARD DISPENSATORY, (Lea Bros. & Co., Philadelphia, 1905), p. 524.

"Cola may be employed for practically the same purpose as caffeine. The remedy has been recommended as a treatment for cardiac failure and for tropical diarrhoea. It is claimed that the powder when eaten increases one's power of enduring fatigue without food, and it has been employed to some extent for this purpose. It may also be given for headache, neuralgia and migraine, and it is useful in cases of nervous breakdown resulting from overwork. Its physiological effects are closely allied to those of caffeine. The dose in substance is from 20 to 40 grains three times daily. *** —**Pharmaceutical preparation.**—Fluidextract of Kola."—NATIONAL STANDARD DISPENSATORY, (Lea Bros. & Co., Philadelphia, 1905). Title, "Cola."

"Coffee, or its alkaloid caffeine, may be employed as a stimulant in collapse and in opium poisoning, since it powerfully effects the respiratory center, which is depressed by the opium. By stimulating

the intellectual centers of the brain, it also keeps the patient awake, and thereby does not allow him to 'forget to breathe.' *** In France, caffeine is very largely employed as a stimulant of the heart in cases of circulatory failure. *** A portion of the increased rapidity of the heart and strength of pulse under its influence is probably dependent more upon its effect upon the nervous system than directly upon the circulatory apparatus. *** Its employment as a stimulant to the heart is not to be resorted to for long periods of time. It is rather a remedy which is to be used to bridge over a crisis. The dose of caffeine, or citrated caffeine, which is more soluble, is from 1 to 5 grains three times a day. When large doses are repeatedly given, patients not infrequently develop what is known as caffeine insanity, owing to its stimulating effect upon the nervous system, and probably by causing increased activity of the kidneys. *** An additional purpose for which caffeine is employed is the relief of neuralgic headache, or that dependent upon eye-strain, in which conditions it does good by stimulating the nervous system. For these conditions it is usually combined with some of the bromides, and often with acetanilid, phenacetin, or antipyrine. There can be no doubt that in this combination it forms one of the most valuable remedies that we have for ordinary neuralgic headache."—THE NATIONAL STANDARD DISPENSATORY, p. 329. Title, "Coffee."

"In man, smaller quantities of caffeine stimulate the central nervous system, in particular that part associated with the physical functions. The ideas become clearer, thought flows more easily and rapidly, and fatigue and drowsiness disappear. Not infrequently, however, connected thought is rendered more difficult, for impressions follow each other so rapidly that the attention is distracted, and it requires more and more effort to limit it to a single object. *** The stimulation of the higher nervous centers is often evidenced by the insomnia and restlessness which in many people follow the indulgence in coffee and tea late at night. *** The action of caffeine on the central nervous system has led to its employment in a number of different conditions. Thus, in nervous exhaustion it may be used to stimulate the brain, and in collapse its action on the vasomotor and respiratory centers has been found of value. *** In narcotic poisoning, with failing respiration, caffeine may be used to stimulate the center in place of strychnine or atropine; in opium poisoning more particularly, strong coffee has been used, but caffeine may be substituted to advantage. Its stimulating action on the brain, and more especially on respiration, renders it an antidote in dangerous cases of alcoholic poisoning, also. Some forms of migraine and headache are relieved by caffeine, but in some it seems rather to intensify the pain; this action has been attributed to its dilating the cerebral vessels. Cola preparations are often advised as general tonics in weakness and neurasthenia."—PHARMACOLOGY AND THERAPEUTICS, OR THE ACTION OF DRUGS (Lea Bros. & Co., Philadelphia, 1906) Title, "Caffeine."

"Caffeine has absolutely no nutritive value. If taken in moderate doses, it has the effect of increasing the blood pressure, and stimulating the cerebrum, thus increasing the reasoning power and the imagination; it is even believed to increase the powers of muscular endurance. Larger quantities, however, are liable to cause trembling of the muscles, and toxic doses have the effect of paralyzing the heart. *** Therapeutically, caffeine is used to combat certain forms of nervous and cardiac depression, certain headaches and neuralgias, gout, the insomnia of alcoholism, and opium narcosis."—THE NEW INTERNATIONAL ENCYCLOPAEDIA (Dodd, Meade & Co., New York, 1913), Vol. 3, p. 788.

In the statement made in connection with his application for the registration of this label, Dr. Pemberton said:

“My trade-mark consists, essentially, of the representation of the coca plant, having printed across it the words ‘French Wine Coca, The Ideal Nerve Tonic, Health Restorer and Stimulant,’ accompanied by the fac-simile signature of J. S. Pemberton. This trade-mark I have used continually in my business since April, 1882. The class of merchandise to which the same is appropriated is a medicinal preparation, and a particular description of goods comprised in said class is a nerve tonic, known as ‘French Wine of Coca,’ and it is my practice to apply my trade-mark to bottles containing the said medicinal preparation by means of suitable labels on which the representation of the coca plant, and the words mentioned, are printed in colors with the fac-simile signature of J. S. Pemberton affixed at the bottom of said label.” (*defendant’s exhibit 23.*)

Defendant’s exhibit 21 is a photograph of the stationery used by the Pemberton Medicine Company in 1888 in connection with the manufacture and sale of “Pemberton’s French Wine of Coca,” a reproduction of which is shown on the opposite page.

A. O. MURPHY, of Barnesville, Ga., (defendant’s witness), one of the partners composing the Pemberton Medicine Co.:

“Defendant’s exhibit 21,—this whole batch of several pages,—is the letter written by me. That is the stationery that we had at that time,—the date

J. S. PEMBERTON.
PEMBERTON'S
FRENCH WINE COCA.



H. O. MURPHY.

E. H. BLOODWORTH.
OFFICE OF

J. C. MAYFIELD

PEMBERTON MEDICINE CO.

SOLE PROPRIETORS OF

PEMBERTON'S FRENCH WINE OF COCA,
GLOBE FLOWER COUGH SYRUP.

Gingerine, Liver Pills, Lemon Juice Cereal, Indian Arrow Root, &c.
67 SOUTH PRYOR STREET

Atlanta, Ga., March 8, 1888

Commissioners of Patents

Washington, D.C.

Dear Sirs

We are about

issuing order for \$6.00 to pay for the

Registration

James G. Gandy

Washington, Medicine Co.

By Appointment



of the letter is March 8th, 1888. That picture on the left of the letter head there is a picture of a coca plant. The old Doctor (Pemberton) had a cut, you know, and we incorporated it in all of our stationery, on our letter heads, and I think it is on the labels that we pasted on the Wine of Coca. *** We tried to carry that through it, you know. That picture there is the picture of the coca plant. *At that time there seemed to be quite an interest in the extract of coca leaves and cola nuts, as a nerve tonic, is my recollection; and, soon after we got over on Pryor and Hunter Streets, we found out that Thurber Wyler & Co., of New York, were putting up a Wine of Coca that they were calling 'French Wine of Coca.'* We got into correspondence with them. It seemed that *it was up there in New York, too,—the effect of the extract of coca leaves upon the nervous system,—*and we at once thought of stopping them, and we did carry on considerable correspondence, to the extent of getting the legal opinion of Hon. J. J. Hammond, who was a personal friend of mine, and also my father-in-law. I went to him as an advisor and told him I would rather pay him to tell me whether I was doing right or not, than to get into a law suit, and I paid him \$40.00 for him to tell me not to get into the suit. We attempted to have them stop, but we abandoned it. I only mention that to show that *coca extract was at that time considered a nerve tonic all around. We advertised that feature of it, as strengthening the strength of the nervous system. The public at that time knew about the coca.* *** This (defendant's exhibit 23) is the label we used on the wine tonic, 'Wine of Coca.' We put the extract into the wine in place of put-

ting it into a syrup, and this went into quart bottles. This is the label on the bottle. I knew what coca was after I got into the business. *The general public heard of it through these preparations, of course.*" (Rec., 1285-1286).

F. M. ROBINSON, a stockholder and director of the Coca-Cola Co., and for 23 years its secretary, but who was formerly associated with Dr. Pemberton in the manufacture of "Pemberton's French Wine Coca":

"Yes, sir, I helped him (Dr. Pemberton) make 'Pemberton's French Wine Coca.' Yes, sir, he used coca and cola nuts in the preparation of that, and a wine. Well, the sales of 'French Wine Coca' were fairly extensive; we thought it was pretty good when we went into it. That was his leading article at the time." (Rec., 356-357). *** Yes, sir, coca leaves and cola nuts were used in the manufacture of 'Wine of Coca.' " (Rec., 365).

Like other coca wines of that day, it was sold indiscriminately to old and young, and to all classes and sexes, as a "general tonic and vitalizer," irrespective of physicians' prescriptions,—just like any other patent medicine. In a letter dated Oct. 4th., 1887, addressed to A. O. Murphy, of Barnesville, Ga., Dr. Pemberton tells of the widespread and popular use to which this cocaine remedy was put:

"French Wine Coca can be made more valuable in 8 years than S. S. S. is now worth, as it is a Universal Remedy,—one good for old and young,—all classes and sexes,—to be used at all seasons of the year. An eminent Physician in New York said there may be a better *Tonic and Vitalizer* in

some other planet than my Wine Coca, but there was none so good in this." (*Defendant's Exhibit 14.*)

SAMUEL C. DOBBS, now vice-president and sales-manager of the Coca-Cola Co., but then a clerk in the employ of A. G. Candler & Co., wholesale druggists, tells of the extensive sale and use of this preparation of cocaine and caffeine long before the remedy which subsequently received the name "Coca-Cola" was devised:

"Dr. Pemberton sold 'Pemberton's French Wine of Coca' a long time before 'Coca-Cola.' A. G. Candler used to buy that *in large quantities*. That was put up in bottles,—what we call 'sixes,'—six to a gallon. I do not remember when the trade on that played out. My recollection is that along in 1887 there was very little, if any, demand for it. We had some in stock, but I don't know whether there was any demand for it or not; but he manufactured it previous to 1886 and 1887,—'Pemberton's French Wine Coca.' Candler & Co. bought a great deal of it, and sold it, but it was not dispensed; it was sold in these bottles as a medicine.

*** It was some kind of nerve tonic." (Rec., 328).

Wine of Coca was manufactured extensively in those years by many concerns throughout the country, and, indeed, was an official preparation listed in the Pharmacopæia⁸ and in Dispensatory.⁹

⁸"VINUM COCAE.—Wine of Coca.—Fluidextract of Coca, 65 Cc.; Alcohol, 75 Cc.; Sugar 65 Gm.; Red Wine, a sufficient quantity to make 1,000 Cc. Dissolve the Sugar in 500 Cc. of Red Wine, add the Alcohol and Fluidextract of Coca, and enough Red Wine to make the liquid measure 1,000 Cc. Set the mixture aside for two days; then filter through paper, in well-covered funnel. Average dose,—16Cc. (14 fluidrachms)."—PHARMACOPÆIA OF THE UNITED STATES (8th Decennial Edition) p. 501.

⁹"VINUM COCAE.—Wine of Coca.—Preparation.—Fluidextract of Coca, 65 Cc.; alcohol, 75 Cc.; sugar, 65 Gm.; Red Wine a sufficient

C. G. PETERS, of New Orleans, 31 years in the retail drug business (plaintiff's witness):

"Yes, sir, I remember the thing that used to be called 'Wine of Coca'; that's an official preparation,—in the Pharmacopæia. I have known 'Wine of Coca' ever since I have been in the business. You ask if I remember who used to put it up; I make it, everybody makes it. It is just open to the whole world. Its color is dark,—like coca-cola, sarsaparilla, and root beer. I haven't made it for a number of years,—it has died out, no use for it. These other things (cola drinks) have taken its place. It used to be made out of coca leaves and Sherry wine.¹⁰ In those old days we gentlemen of the trade used to buy the coca leaves and the Sherry wine and make it ourselves, or we made it out of the fluid-extract of coca. *** Yes, sir, the coca leaf has in it the element of cocaine. *When I sold 'Wine of Coca' there was cocaine in it, yes, sir. The fluid-extract of coca was a commercial article at the time I am speaking about, and the 'Wine of Coca' was sold extensively, but 'Wine of Coca' has not been used for the last eight or nine years. However, it was the predecessor of these things (cola drinks),*

quantity to make 1,000 Cc. (The rest of the process given, same as in United States Pharmacopæia.) *** Each Cc. of Wine of Coca represents 0.065 Cc., or 1 fluidrachm about 4 minims, of Fluidextract of Coca. **USES.**—This preparation combines the stimulant effects of coca with those of the menstruum. **It has become very popular with the laity as a remedy in mental and physical fatigue. It may be administered whenever the effects of the drug are desired.** The doses are from 2 to 8 drachms (9-30 Cc.)"—THE NATIONAL STANDARD DISPENSATORY (Lea Bros. & Co., Philadelphia and New York, 1905) pp. 1637-1638.

"WINE.—5. In Pharm.—A solution of a medicinal substance in wine; as, **Wine of Coca; Wine of Colchicum.**"—CENTURY DICTIONARY (1899), Vol. X, p. 6939.

¹⁰**"COCA WINE (Vium Cocae).**—A wine used for stimulating purposes, consisting of about 1 part of coca and 8 parts of Sherry."—NELSON'S ENCYCLOPÆDIA, Perpetual Loose Leaf Edition (Thos. Nelson & Sons, New York), Vol. 3, p. 213.

and had *the same general look and taste*. There was no secret in the trade,—*those who used 'Wine of Coca' knew what it was made of, certainly*. It was generally understood by the physicians that there was not enough *cocaine* in it to do any harm. It was simply a *stimulant*." (Rec., 655-656).

DR. JOHN A. WESSNER, of Chicago (plaintiff's witness):

"Yes, sir, I am familiar with 'Wine Coca.' Yes, sir, I think I have seen the labels that were used on the old bottles of 'Wine Coca' showing pictures of coca leaves and cola nuts thereon. *** It is true that Park-Davis & Co., of Detroit, manufactured for a great many years a preparation of this character, and sold it extensively throughout the United States; but they sold that as a medicinal preparation. *** I am not familiar with the fact that Dr. Pemberton made a product called 'Pemberton's French Wine.' " (Rec., 925).

JOHN W. ROSSITER, of Chicago, (plaintiff's witness):

"There was one remedy, a patent medicine, that was sold quite extensively here for a while that was known, I think, as 'Wine of Coca.' It had quite a sale here for a while. That, to my knowledge, was about the only preparation of coca that was sold very extensively. It was sold as a proprietary remedy." (Rec., 936).

SAMUEL C. DOBBS, vice-president and sales-manager of the Coca-Cola Co.:

"Among other coca wines and coca cordials that were made at that time by various parties, was

‘Vin-Mariani,’ and ‘Kolaфра.’ ‘Mariani’ was made up east somewhere, and ‘Vin-Kolaфра’ was made by Johnson & Johnson. There was ‘Vin-Mariani,’—oh, three or four of those preparations that I do not recall right now, all put up in bottles. I presume they were made out of coca; they carried that inference by the name on them. Along about that time, or just previous thereto, there was quite a little business on that class of product,—they had a sort of run on it in those years.” (Rec., 328-329).

DR. WILLIAM M. SIMONSON, of Cincinnati,
(defendant’s witness):

“A considerable number of preparations of coca leaves came into use about 1886, chiefly on account of the agitation due to the introduction of the prepared alkaloid into medical and surgical practice.”¹¹ The cocaine was much talked of in pharmaceutical and surgical practice about 1884-1886, and these various wines, and the like, were put on the market before that period. From my experience, which was obtained from my connection with the drug business, they were sold largely outside of physicians’ orders. They were more or less known popularly, and I know for myself that I have sold them often without any orders from any physician what-

¹¹“**Cocaine** is an alkaloid extracted from the leaves of *Erythroxylon coca* (see **Coca**), a shrub cultivated in the tropics of both hemispheres. It was discovered by Neumann in 1860, and introduced into surgical practice by Koehler in 1884.—NELSON’S ENCYCLOPAEDIA, Perpetual Loose Leaf Edition (Thos. Nelson & Sons, New York) Vol. 3, p. 211.

“Although an alkaloid called Erythroxyline, which subsequently received the name cocaine, was obtained from coca as long ago as 1855, the history of the agent in actual therapeutics did not begin until 1884, when Karl Koehler demonstrated its practical utility. Since then its use has been developed to a very extensive degree, and many applications have been found for it both in medicine and in surgery.”—THE AMERICANA (The Americana Co., New York, 1917), Vol. 5, Subject,—“Cocaine.”

ever, much like any ordinary merchandise package would be sold at any pharmacy." (Rec., 2510).

The fluid extract of coca,¹² of which these wines were chiefly composed, was a well known commercial article at that time, and many druggists throughout the country made it themselves from the coca leaves. It was one of the official preparations of coca.

¹²**"FLUIDEXTRACTA.—Fluidextracts.**—The term fluidextract, in its present acceptation, is applied to concentrated alcoholic, or hydro-alcoholic solutions of vegetable principles, which are permanent and represent **all the active virtues of the drugs** from which they are made; they are officially recognized in the Pharmacopoeias of the United States, Great Britain, Germany and Switzerland, differing but slightly in strength in the four countries. *** Prior to 1880 the strength of fluidextracts, as prescribed by the Pharmacopoeias, was 1 grain of drug to 1 minim of fluidextract; since that time the Pharmacopoeial strength is based upon the relations of the metric measure of weight and capacity, so that any weight of a given drug is to be converted into a fluidextract having the bulk of the same weight of water at its maximum density, or, in other words, 1 Gm. of the drug is represented by 1 Cc. of the fluidextract. The exceptions to this rule are the **fluidextracts of aconite, belladonna root, cinchona, coca, colchicum seed, conium, hydrastis, hyascyamus, guaranna, ipecac, nux vomica, pilocarpus, scopola. and stramonium, all of which are directed to be standardized at a definite alkaloidal strength.** *** All the official fluidextracts are directed to be prepared by percolation a menstruum uniform in alcoholic strength being employed during the process of exhaustion. *** Arranged according to menstruum, the **official fluidextracts** may be divided into 22 classes, as follows: *** Alcohol 1 volume, water 1 volume (diluted alcohol): berries, chimaphila, chirata, **coca,**" etc.—**NATIONAL STANDARD DISPENSATORY**, (Lea Bros. & Co., Philadelphia) pp. 646-648.

"FLUIDEXTRACTUM COCAE.—U. S.—Fluidextract of coca.—Preparation.—Coca, in No. 40 powder, 1000 Gm.; diluted alcohol, a sufficient quantity to make 1000 Cc. Moisten the powder with 450 Cc. of diluted alcohol and pack it firmly in a cylindrical percolator; then add sufficient diluted alcohol to saturate the powder and leave a stratum above it. When the liquid begins to drop from the percolator, close the lower orifice, and, having closely covered the percolator, macerate for 48 hours. Then allow the percolation to proceed, gradually adding diluted alcohol, until the coca is exhausted. Reserve the first 800 Cc. of the percolate and evaporate the remainder at a temperature not exceeding 50° C. (122° F.) to a soft extract; dissolve this in the reserved portion, and mix thoroughly. *** Assay 10 cubic centimeters of this liquid by the process given below; from the results thus obtained, ascertain by calculation the amount of ether soluble alkaloids in the remainder of the liquid, and add to this enough diluted alcohol to make each 100 cubic centimeters contain 0.5 Gm. of the ether soluble alkaloids of coca" [that is, of cocaine and its derivatives]—**NATIONAL STANDARD DISPENSATORY** (Lea Bros. & Co., Philadelphia) p. 658; **THE PHARMACOPOEIA OF THE UNITED STATES**, 8th Decennial Edition, p. 175.

C. G. PETERS:

"The fluid extract of coca was a commercial article generally sold at the time I am speaking about." (Rec., 656).

WILLIS E. VENABLE, (plaintiff's witness):

"I took the coca leaves and made my fluid extract of coca myself by percolation,—made many a gallon besides what I made for the 'Coca-Cola,' before that and since. They used that in the drug business, and I have been in the drug business *** all my life." (Rec., 393).

Nashville Syrup Co. vs. Coca-Cola Co., 215 Fed., 588 ("C. C. A."-6):

"Coca is a South American shrub, from the leaves of which cocaine, among other substances, is obtained; the cola tree grows in Africa, and from its nuts caffeine may be extracted. The use of these leaves and these nuts by the natives in their respective countries, and for the supposed stimulating qualities, had long been known in this country, and before 1887 extracts respectively from coca leaves and cola nuts had found a place in the Pharmacopoeia. *** The extracts were used mainly by druggists in compounding medicine."

DR. JOHN A. WESENER (plaintiff's witness):

"Park-Davis & Co. make up one product which is known as fluid extract of coca, and another product known as fluid extract of cola. *** They are medicinal products." (Rec., 931)

Prior to 1885, Benjamin Kent, a retail druggist of Patterson, New Jersey, who had carried a line of coca

wines for a number of years, devised a "tonic" composed essentially of the fluidextract of coca and caffeine, which he recommended to his trade and dosed out to them from a bottle on his shelf. In 1885, in looking over the catalogue for the years 1883 and -4 of Frederick Stearns Company, of Detroit, his attention was attracted to two parallel articles, one commenting upon the drug coca, and the other upon the drug cola. The idea immediately struck him that, as his remedy was a compound or mixture of the fluidextract of coca and caffeine (the active principle of cola), it would be to call it "Coca-Cola." So he adopted "Coca-Cola" as the name of his preparation and thereafter labeled his bottles with that name.

BENJAMIN KENT, of Patterson, New Jersey:

"I offer in evidence this book,—this catalog,—of Frederick Stearns Company, of Detroit, Mich. The catalogue is No. 84, dated 1883 and—4, and on page 38 there are parallel articles on Coca and Cola, commenting on those two drugs. There is no association in this book between one and the other, but the idea of coupling the two together I got from this book. They were of the same relative medicinal properties, both nerve tonics. We had previously used a mixture of coca, and the idea of coupling them was from this book. For some years we had used this 'Coca-Cola' from a shelf bottle,—I use the word 'shelf bottle' to distinguish it from a proprietary medicine. For a while I used it myself just for dosing out. It gradually grew up to the proprietary form in which it is now sold. In 1888 we put it up in the form of a patent medicine.

Q. Is the term 'Coca-Cola' original with you? A. Yes, sir,—that is, the coupling of the words. Q. The compound word? A. Yes, sir; the catalogue makes no mention of them together; they have no association with each other; the idea of coupling the two together was original with me. *** Q. Will you state the composition of the article which you put up called 'Coca-Cola'? A. It contains the extract of coca and caffeine, which is the active principle of the cola nut; also, tincture of bitter orange peel, and some little flavorings; that is all, and some spirits to keep it." (*pp. 12 and 16, Defts. Ex. 68*).

CHARLES E. CLOSTER, of Mt. Vernon, New York, formerly in the employ of Benjamin Kent at Paterson, New Jersey:

"I worked for Mr. Kent for four years prior to October, 1888. *** Q. You say this 'Coca-Cola' was talked of in the latter part of 1885? A. Previous to that. *** Q. How was the talk of it originated? A. It came from Fred Stearns' price list. It was a time when we had several preparations of coca on the market, and, looking over Stearns' list, we struck on the name 'Coca-Cola,' and that is where the name originated. We put up the same preparation at the time, but we had no name for it until we struck Stearns' list. *** It was not known as that until we got the name out of Fred Stearns' list. The name 'Coca-Cola' originated somewhere in the latter part of 1885. We made the preparation previous to that, but had no name for it that I can remember,—simply that it was a coca tonic, that is all; but we applied it from that list, and printed a list with it in. *** Q. Previous to that time it was not known as 'Coca-Cola'? A. No, sir.



Q. Simply 'the coca preparation'? A. Yes, sir."
 (pp. 4, 5, and 6, *Defts. Ex. 68*).

On Nov. 1st., 1888, Benjamin Kent filed in the Patent Office an application to register the words "Coca-Cola" as a trade-mark for his said tonic, and registration was duly granted, and a certificate (No. 16,209) was issued to him January 22nd., 1889. (*Defts. Ex. 70, p. 1*).

Prior to 1886, Oliver M. Stiger, of 58 Barclay Street, Burgen Point, Hudson County, New Jersey, devised a medicated "tonic" composed of the fluidextract of coca and barley malt, to which, on January 1st., 1886, he applied the name "Coca-Malta." *Defendants' Exhibit 180* is a Patent Office copy of the trade-mark for "Coca-Malta" tonic, which was registered Feb. 9th., 1886, a reproduction of which is exhibited on the opposite page.

The "statement" describes the mark as follows:

"My trade-mark consists of the word 'Coca-Malta.' This has been generally arranged as shown in the accompanying fac-simile, which represents the leaves of the coca plant and heads of barley. Upon the leaves and barley heads is printed the word 'phosphated,' and above the word 'phosphated' is the word 'Stiger's,' and below the word 'Phosphated' is printed in a curve, the word 'Coca-Malta,' which appears upon the leaves and barley heads, and below the word 'Coca-Malta,' on the leaves, is printed, in a straight line, the word 'Tonic.' The letters are in plain type, and the representation of the coca and barley are also printed in black; but the words may be differently arranged, and other forms of type may be used, and the pictures may be of appropriate colors, without materially alter-

ing the character of my trade-mark, the essential feature of which is the word 'Coca-Malta.' This trade-mark has been used continuously in my business since Jan. 1st., 1886. The class of merchandise to which this trade-mark is appropriated is medicines, and the particular description of the goods comprised in said class upon which I use the trade-mark is tonics. It is my practice to apply the trade-mark to bottles containing the tonic by means of suitable labels on which it is printed in black or in colors as above described. (*Defts. Ex. 180, p. 2*).

Thus it is evident that for many years before 1886,—the year in which plaintiff claims its product was invented,—and during the years immediately following, the drugs coca and cola were well known articles of commerce and widely used in ethical, proprietary and domestic medicine. Cocaine, the active principle of coca, had been definitely and permanently introduced into medical and surgical practice, and the newspapers and trade journals of that day were full of lengthy articles describing its wonderful physiological effects and heralding the great revolution in medicine and surgery it had accomplished. By their labels and advertisements, the manufacturers of the various cocaine and caffeine remedies had spread a knowledge of coca and cola among the people generally, and impressed upon them the fact that these drugs are powerful nerve stimulants, and that the merits of preparations of coca and cola are due to the stimulating or "tonic" properties which these drugs supply. It was at this stage in history of the development of such reme-

dies that Dr. Pemberton [whom plaintiff claims was the originator of its product (Rec., p. 2)] began to compound the "tonic" which subsequently received the name "Coca-Cola."

c.—ORIGIN OF "COCA-COLA."

The way it came about was this: In 1885 Dr. Pemberton formed an association with F. M. Robinson, Ed. Holland and D. D. Doe, whereupon the four organized a corporation, known as the Pemberton Chemical Company, the better to exploit "Pemberton's French Wine Coca," and Dr. Pemberton's other remedies, such as "Indian Queen Hair Dye," "Globe Flower Cough Syrup," "Gingerine," "Compound Extract of Stillingia," etc. By 1886 the trade on the "Wine of Coca" began to play out (Rec., 328). Like all the other coca wines and so-called cola cordials, it was marketed in quart bottles and retailed for a dollar (Rec., 329; 348; 378). The price was high, and the method of distribution, necessitating the purchase of a quart at a time, tended somewhat to restrict the market. The profits on the other preparations were not encouraging. Sales lagged. But old Dr. Pemberton, steeped in the drug that held him victim, dreamed the dope-fiend's dreams of fortunes made and spent. From his own ghastly experience he knew how insidiously the deadly drug takes hold of its unsuspecting victims, and how tenaciously it holds them in its grip. With the insane cunning of the drug-addict, and the inordinate greed that inevitably takes possession of such creatures, he conceived the diabolical scheme of foisting the "dope-

tonic" on the public generally and reaping untold wealth from the hapless victims who acquired the habit. His plan was to popularize the thing and bring it within reach of every one, rich and poor, regardless of age or sex, by dispensing it at soda fountains, as a medicated, or "tonic," beverage at 5c per dose,—very much as bromo-seltzer, capudine, seidlitz-powders, and other headache remedies were administered, and, as the headache remedies were administered, and as the medicated "tonic" beverage known as "Moxie," which had taken the market by storm, was then being dispensed broadcast up East.¹³

¹³DR. JOSEPH JACOBS:

"At the time we bought it ('Coca-Cola') from Dr. Pemberton, 'Moxie' had a large sale, and we thought we would make a big thing out of it as 'Moxie,'—that was put up East." (*Rucker Rec.* 315.)

NOXIE NERVE FOOD CO., vs. BAUMBACH, et. al., 32 Fed., 205.

"In this case it would appear that Augustin Thompson, M. D., early in 1885 manufactured a beverage called by him 'Moxie Nerve Food,' and, deeming it of great value commercially, filed with the United States Commissioner of Patents an application for a trade-mark therefor on the 16th day of July, 1885, which was afterwards registered in the patent office, Sept. 8th., 1885, and from which it appears that such trade-mark had only been in use since April 1st., 1885; the term 'Moxie' being the trade-mark word, while the label included a picture and other descriptive words. Thompson sold this trade-mark to complainant in July, 1885, and the complainant has used the same as his trade-mark and label ever since. *** Shortly after the Moxie Nerve Food Company got under full headway, quite a number of persons or nerve food companies sprung up, claiming to manufacture or sell nerve food **beverages**, and all manufacturing a beverage of the same, or very similar, taste, flavor and odor to that of the complainant"

MOXIE NERVE FOOD COMPANY vs. MADOX COMPANY, 152 Fed., 494:

"It is shown, and is not denied, that the complainant's article 'Moxie,' or 'Moxie Nerve Food,' is a harmless beverage which for many years has had a very large sale. It also appears that it is offered to the public as a 'Nerve Food' or 'food for the nervous system,' and is a cure for nervous disorders; and that there is a public demand for the article as a cure for nervous disorders. The trade-mark which the complainant desires to protect was registered in the patent office in Sept., 1885, upon a statement and declaration of Dr. Augustin Thompson.

"'This trade-mark I have used continuously in my business since April 1st., 1885, and the particular description of the goods is a liquid preparation charged with soda for the cure of paralysis, softening of the brain, and mental imbecility, and called "Moxie Nerve Food." It is comprised in the class of medical compounds.'

"Upon the label accompanying the declaration was the statement:

"'Moxie Nerve Food *** is a simple starchy plant grown in South America, and the only positive nerve food known that can recover brain and nervous exhaustion, and loss of manhood, at once unaided. It has cured paralysis, softening of the brain, and mental imbecility,' etc.

"It also appears that at the time of the filing of the bill 'Moxie' was presented to the public as a nerve food, or food for the nervous system, and as a preparation containing an ingredient of remarkable curative powers, as will appear from the following copy of the label affixed to bottles:

"'More palatable if served ice cold. Keep in cool place. Moxie Nerve Food. Trade-mark registered. A food for the nervous system, also a delicious beverage. *** It is prepared from a simple sugar-cane like plant grown near the equator. It was lately discovered by Lieut Moxie, who placed the discovery in the hands of Dr. Augustin Thompson, who has demonstrated its value as a food for the nervous system. It has proved itself the only harmless and effective nerve-food known to science, and has recovered brain and nerve exhaustion, also paralysis, softening of the brain, locomotor ataxia, and insanity, when caused by nervous exhaustion. It nourishes the nervous system, gives a durable, solid strength without stimulation or reaction, creates a vigorous, healthy appetite, removes fatigue from mental and physical overwork, and brings refreshing sleep at night,' etc.

"The bill alleges:

"'That the beverage "Moxie" **** is a meritorious and useful article well esteemed for its tonic action and for its useful remedial effects under certain conditions and diseases, and that it is recognized by reputable members of the medical profession as a meritorious preparation, and is, and has been by them, prescribed when indicated, and public institutions, such as hospitals, homes for consumptives and the aged and infirm, and the like, have been, at their request, supplied with "Moxie" for the use of the inmates.' ***

"The defendants have offered in evidence advertisements inserted in the Lowell Morning Times by Dr. Augustin Thompson in Feb., 1885, in part as follows:

"'From South America.—On the Pacific side, in South America, the Indians grow a plant something like our rhubarb from which they make a decoction like our tea and coffee. This is their national drink. From its use they are able to undergo great fatiguing exertions without the ordinary results. It seems to be a nerve food instead of a medicine, as its use leaves no reaction or nervousness. *** One of our prominent physicians is about to introduce it here and it will soon be on sale by the grocers and apothecaries, cheap enough that all may use it. *** It will be called the "Bolivian Nerve Food," or "Moxie Appetizer." It builds an appetite by building the nervous system which governs the functions of the body. Will be ready by March 3rd.'

"The next advertisement, in March, 1885, was in part as follows:

"'Last week we called your attention to the product from South America lately introduced by Lieut. Moxie as a nerve food. His attention was first called to it by its general use by the natives and singular action on the nervous system, while he was traveling in Bolivia. From information obtained from him it has been brought to Lowell and thoroughly tested for three months.'

"Medical and chemical experts say that these descriptions are suggestive in part of coca,—'erythroxylon coca,' *** In the bulletins of the Bureau of the American Republics, printed by the government,

appears, in the hand book on Bolivia, Vol. 4, p. 42, a reference to 'coca,' or 'erythroxylon coca,'—

"the dried leaves of which are a highly stimulating narcotic, and are chewed by the Bolivians and Peruvian Indians, by travelers in the Upper Andes, and by the Bolivian soldiers when in the field, just as betel is used by the inhabitants of the East Indies."

*** It is highly probable that the author of these advertisements was influenced by a knowledge of this stimulant used by the Bolivians when he called his preparation 'Bolivian Nerve Food,' and wrote his account of the 'national drink.' That there is another Bolivian plant that has such points of resemblance to coca, and is yet so different, and which forms the curative agent in 'Moxie,' does not seem highly probable. ***

"Dr. Frederick T. Rogers says:

"It is impossible, with the thousands of enthusiastic and educated men who are investigating and studying the medicinal virtues of the world's flora, that any one man should discover and appropriate to his own uses any plant which possesses in any degree the properties ascribed to the principle ingredient of "Moxie," without becoming common knowledge, and there is not in materia medica any single or compound vegetable agent which possesses these powers."

"Dr. Thompson, in his application for registration of trade-mark said:

"The material to be covered by this trade-mark is a fluid resembling in color the usual extract of vanilla, has a bitter taste, with an associate taste like common "tonic beer." The taste is from the flavoring extract. The base, the most useful part of this compound, is as tasteless as common corn stalks." ***

"Dr. Alfred H. Tuttle, of Cambridge, Mass., testified (for the Moxie Nerve Food Co.) that he had used 'Moxie' in many cases of nervous exhaustion, in conjunction with other treatment, and in some instances it was practically the only treatment. He was asked:

"Q. From your observation can you state what the physiological effects of "Moxie" are when exhibited in cases of nervous exhaustion? A It produces a mild evacuation of the bowels, and increases the flow of urine,^a and promotes the appetite. It causes a mild sense of well being,^b which is evidently of a tonic nature. I consider "Moxie" as a valuable adjunct in the treatment of all cases of nervous disorders caused by nervous exhaustion, and in many cases is all the treatment, excepting rest, fresh air, and restrictive diet, that is necessary."

"'Moxie' was put up not only in liquid form, but in the form of lozenges. The statement concerning 'Moxie,' made in connection with these lozenges, is directly relevant to an inquiry into the true origin and ingredients of 'Moxie.' Attention is called to the medicated 'Moxie Lozenges,' respondent's exhibit 37. On the box is the statement:

"The Moxie Nerve Food, from which this lozenge is made, has had the largest sale ever known in the history of trade, 5023,741 quart bottles having been sold during the first fifteen months.*** It is generally believed that it has saved 228,000 drunkards and 389,000 nervous wrecks during the last year."

^a"The most important property of caffeine, from a therapeutic point of view, is its power of increasing the secretion of urine.*** In their action on the kidneys, the members of the caffeine series stand preeminent, no other drug producing such a copious flow of urine as either caffeine or theobromine."—**PHARMACOLOGY & THERAPEUTICS, OR THE ACTION OF DRUGS** (Cushny), Lea Bros. & Co., Philadelphia, 1906, Title—"Caffeine."

Accordingly in May, 1886, he revised the "Wine of Coca" by changing it from the form of a wine to the form of a syrup the better to adapt it to use at soda fountains. The revision consisted simply in the elimination of the Bordeaux wine and the fluidextract of damiana, and the substitution of a simple syrup consisting of a solution of sugar dissolved in water.

Except for the damiana, the "tonic properties" remained the same. There was no change in the flavoring extracts (Rec., 656). It is true that the syrup did not have the deep rich wine color of the wine, or the color of "Moxie," but this difficulty was overcome, and the color of the syrup was made to resemble that of the wine, and of "Moxie," by the use of the artificial coloring agent known as caramel, or burnt sugar, coloring. Then the question arose as to a fitting name for the revised product. It was not intended to discontinue the manufacture and sale of the tonic in the wine form. That was the Pemberton Chemical Company's best seller, and a tried money-maker was not to be discarded for a mere experiment. The plan was to sell the "tonic" in both forms, and thus catch the trade coming and going. But to avoid confusion, it was necessary to give the revised product a separate name, and, besides, as it was no longer a wine but a syrup, it would have been inaccurate to continue to call it "*Wine of Coca*." However, it was still essentially a compound or mixture of the powerful, concentrated extract of coca and caffeine, and F. M. Robinson

^b"When taken internally, cocaine is a mental stimulant, and moderate doses usually cause a pleasant sense of exhilaration and temporary increase of mental and physical power."—**THE AMERICANA** (The Americana Co., N. Y., 1917) Vol. 5, Title, "Cocaine."

thought the most apt and appropriate name for it would be to call it "Coca-Cola." That name would lead the public to believe that it was essentially a compound of the drugs coca and cola, and would enable the Pemberton Chemical Co. to profit by the great demand that existed at that time for preparations of that character. The other stockholders agreed and the name "Coca-Cola" was adopted.

F. M. ROBINSON, a stockholder and director in the Coca-Cola Company, and for twenty-two years its secretary, but who, at the time referred to, was a stockholder in the Pemberton Chemical Company:

"I came here [Atlanta] from Lyons, Iowa, in December, 1885, accompanied by Mr. D. D. Doe. *** Messrs. Pemberton, Ed. Holland, D. D. Doe, and I then formed a stock company known as the Pemberton Chemical Company, a copy of the charter of which is the paper exhibited to me. *** Dr. J. S. Pemberton had been in previous years a druggist, but he was then what you might call a manufacturing chemist. He put into the corporation several preparations, the principle of which was 'Pemberton's French Wine of Coca,' which was a patent medicine selling at a dollar a bottle, and there was a preparation called 'Gingerine,' 'Indian Queen Hair Dye,' and 'Pemberton's Globe Flower Cough Syrup.' During that period Dr. Pemberton was continually experimenting on other drinks and chemical compounds. Well, he was not compounding anything particular at that time, outside of these that were put into the business and until the time of this preparation, 'Coca-Cola.' The preparation 'Coca-Cola' was not made immediately after the

COCA-COLA

SYRUP * AND * EXTRACT.

For Soda Water and other Carbonated Beverages.

This "INTELLECTUAL BEVERAGE" and TEMPERANCE DRINK contains the valuable TONIC and NERVE STIMULANT properties of the Coca plant and Cola-(or Kola) nuts, and makes not only a delicious, exhilarating, refreshing and invigorating Beverage, (dispensed from the soda water fountain or in other carbonated beverages), but a valuable Brain Tonic, and a cure for all nervous affections — SICK HEAD-ACHE, NEURALGIA, HYSTERIA, MELANCHOLY, &c.

The peculiar flavor of COCA-COLA delights every palate; it is dispensed from the soda fountain in same manner as any of the fruit syrups.

J. S. Pemberton,

Chemist,

Sole Proprietor, Atlanta, Ga.

organization of said company, but several months afterwards it was,—some five months, I guess, after this charter was applied for. We commenced making what we called ‘Coca-Cola’ in May, 1886. *** This product had no name in the beginning,—it was being experimented upon. Dr. Pemberton compounded a preparation, it was taken down to Mr. Venable’s soda fountain for the purpose of trying it to ascertain whether it was something that people would like or not, and, after they had made various changes in the compound, it seemed to be satisfactory, and then the question came up with reference to having a name for it. There were four of us in the corporation, and they agreed to submit four names, each one of the members submitting a name. I submitted the name ‘Coca-Cola,’ and it was afterwards adopted and used. *** The syrup was given this name on account of the extracts which it contained, ‘coca’ and ‘cola,’ made from coca leaves and from the cola nut.” (Rec., 354)

**d.—WHAT THE ORIGINAL “COCA-COLA”
WAS HELD OUT TO BE.**

On July 27th., 1887, Dr. Pemberton registered in the Patent Office, in his own name as sole proprietor (Rec., 349), the label with which all packages or containers of this “Coca-Cola” were labeled, a photograph of which, duly authenticated by the Commissioner of Patents, and in evidence as *Defendant’s Exhibit 271*, and is reproduced on the opposite page.

From this label we learn that this “Coca-Cola,” like the “Wine of Coca,” was “stimulating, refreshing, exhilarating and invigorating;” that, like the “Wine of

Coca," it was an "intellectual beverage" and a "valuable brain tonic;" that, like the "Wine of Coca," it contained "the valuable tonic and nerve stimulant properties of the coca plant and cola nuts;" and that, like the "Wine of Coca," it was "a cure for all nervous affections,—sick headache, neuralgia, hysteria, melancholy, etc." It differed from the "Wine of Coca" in that, not being a *wine*, but a syrup, it was a "*temperance* drink," and was "dispensed from soda water fountains," in the form of "a beverage," or else taken "in other carbonated beverages" as a pleasant means of administration. In all essentials it was the same as the "Wine of Coca;" it differed only in its accidents. It had the same medicinal ingredients, was advertised and sold for the same purpose and to cure the same ailments, and had the same effect on those who took it. F. M. Robinson admits that "some of the same material, perhaps, went into both" (Rec., 365) and that, "I don't know but there was some 'Coca-Cola' manufactured in the same tank,—mixed in the same tank as the 'Wine of Coca,' possibly." (Rec., 365). An extract containing the medicinal agents was made up, and then, when they wanted to make "Wine of Coca," they put it into the wine, and when they wanted to make "Coca-Cola," they put it into the syrup.

A. O. MURPHY:

"We put the extract into a wine [in making 'Wine of Coca'] in place of putting it into a syrup." (Rec., 1287).

The stationery which Asa G. Candler used in his "Coca-Cola" business up to the time of the organization

of the Coca-Cola Company in 1892 (a specimen of which is in evidence as *Plaintiff's Exhibit 76*), shows that at that time Asa G. Candler, now president of the Coca-Cola Company, then advertised his "Coca-Cola" preparation as a remedy containing the "tonic properties" of both coca and cola,—that is, as a remedy depending for its effect upon the combined action of both cocaine and caffeine. His stationery bore the following announcement:

"Office of Asa G. Candler, sole proprietor of Coca Cola, delicious, refreshing, exhilarating and invigorating. The new and popular fountain drink, *containing the tonic properties of the wonderful coca plant and the famous cola nut*. On draft at all popular soda fountains at 5c a glass." (*Plaintiff's Exhibit 76*).

The charter of the Coca Cola Company (*Plaintiff's Exhibit 1*), which was granted January 29th., 1892, and under which plaintiff is operating to-day, shows that in 1892, Asa G. Candler, Judge John S. Candler, F. M. Robinson, and the others who organized the Coca Cola Company, looked upon this "coca-cola" remedy as a medicine pure and simple. Thus:

"The petition of Asa G. Candler, F. M. Robinson and John S. Candler, of the State of Georgia, and J. M. Berry, of the State of Virginia, and F. W. Prescott, of the State of Massachusetts, shows: That they, for themselves, associates, and successors, desire to be incorporated for a term of twenty years, with privilege of renewal at the expiration of that time, under the name and style of 'The Coca-Cola Company.' The object of this association is

the manufacture and sale of the copyrighted *medicinal article known as 'Coca Cola,'* and the manufacture and sale of such *other medicinal articles and beverages as they may desire.*" (*Plaintiff's Exhibit 1*).

SAMUEL C. DOBBS, a stockholder and director in the Coca-Cola Company, and the sales manager of that concern:

"It is a remedial agent for nervous headache. Q.—You have tried it? A.—A few times. Q.—As a remedial agent for nervous headache? A.—Yes, sir. Q.—You found it beneficial? A.—Yes, sir. (*Rucker Rec.*, 335). * * * Q.—Does it cure headache? A.—It relieves headache, in my opinion. *** Q.—Does it relieve exhaustion? A.—I think so, under certain conditions. Q.—It cures headache and relieves exhaustion, to a certain extent? A.—Yes, sir." (*Rucker Rec.*, 336).

F. M. ROBINSON, Secretary of the Coca-Cola Company:

"Q.—Why did you ever advertise it as a cure for headache and relief from nervous exhaustion? A.—That was one of the features of it." (*Rucker Rec.*, 302).

ASA G. CANDLER, President of the Coca-Cola

"Q.—Why does it cure headache? A.—Because it is a mental brain stimulant; it relieves and quiets the brain." (*Rucker Rec.*, 267).

On May 14th., 1892, the Coca Cola Company applied to the Patent Office for registration of the words "Coca-Cola" as a trade mark for its product, where-

upon an interference proceeding arose between it and Benjamin Kent, of Patterson, New Jersey, who had previously obtained registration for the words "Coca-Cola" as his trade-mark January 22nd., 1889, Registration No. 16209 (*Defendant's Exhibit 68*). That plaintiff's "Coca-Cola" was considered a medicine at that time is clear, because, if it had not been considered "merchandise of the same descriptive properties" as Kent's "Coca-Cola,"—that is, *medicine*,—but simply and solely a refreshing non-alcoholic *beverage*, then the use of the words "Coca-Cola" by the plaintiff as a trade-mark for its *beverage* could not have interfered with the use of those words by Kent as a trade-mark for a different class of goods,—namely, his *medicinal preparation*,—and there would have been no occasion for an interference proceeding. But, because both "Coca-Colas" were considered to be medicines and, therefore, "merchandise of the same descriptive properties," the proceedings had to be fought out. In the end, the Coca Cola Company prevailed,—not on the merits, however, but by the sheerest technicality, as the opinion of the Examiner of Interferences in that case shows (See *Defendant's Exhibit 70*).

Just how the Coca-Cola Company, or Kent, either, for that matter, ever succeeded in getting admitted to registration, under the provisions of the Trade-Mark Act of March 3rd., 1881, a term which was so manifestly either the descriptive name of the article, or else a deceptive term, as was "Coca-Cola," does not satisfactorily appear.

For many years plaintiff advertised and sold its "Coca-Cola" remedy throughout the length and breadth of the land as a medicine for the cure of headache and nervous exhaustion, as well as for the relief of mental and physical fatigue, and as a matchless "brain tonic," "nerve tonic," and "stimulant," and plaintiff built up its business and the reputation and demand for its product, by means of these representations.

ASA G. CANDLER (testifying in *Coca-Cola Co. v. Henry A. Rucker, Revenue Agent*, in the U. S. District Court, Atlanta, 1902):

"Q.—Mr. Candler, have you ever stated that this 'Coca-Cola' was good for headache? A.—Yes, sir. Q.—For exhaustion? A.—Yes, sir. (*Rucker Rec.*, 262). *** Q.—What is the main controlling thing and purpose you sold this for? A.—For headache and exhaustion. Q.—Is that the only purpose for which this is sold? A.—That is the only purpose we have. (*Rucker Rec.*, 262). *** Q.—Is not that the sole purpose? A.—Of course. Q.—Was not the company organized to manufacture it for that purpose? A.—Yes, sir. (*Rucker Rec.*, 268). *** State whether or not that is the main thing you sell it for? A.—That seems to have been the main thing. Q.—I believe you just stated that the main purpose in advertising it that was was to sell it? A.—Yes, sir, that is right. Q.—To call attention to its medicinal properties, and, notwithstanding its use as a beverage, you have asked people call for this kind of a beverage because it has certain *effects*? A.—Yes, sir. Q.—You say the main purpose of this language is to sell it—about headache and exhaustion? A.—Yes, sir. Q.—You say the

main purpose is to help sell the article? A.—Yes, sir. *** What is the main purpose of all the language you used,—to help sell it? A.—Why, certainly. *** Q.—The main purpose of the language as to headache and exhaustion was to sell it? A.—Yes, sir. *** Q.—What was the purpose,—the main purpose,—of all the language in these advertisements? A.—To market the goods.” (*Rucker Rec.*, 271).

On June 13th., 1898, Congress passed an Act, known as the Internal War Revenue Act of 1898, for the purpose of raising revenue to carry on the war with Spain. Among other things, the Act laid a heavy tax on patent medicines and nostrums of all kinds. In Schedule “B” of the Act, under the head of “Medicinal, Proprietary Articles and Preparations,” the articles subject to this tax were thus defined:

“Every package, box, pot or phial, or other enclosures, containing any pills, powder, tinctures, trochies, lozenges, syrups, cordials, bitters, anodynes, tonics, *** and all medicinal preparations or compositions whatsoever, made and sold or removed for sale by any person or persons whatever, wherein the person making or preparing the same had, or claimed to have, any private formula, secret or occult art for making or preparing the same, or has, or claims to have, any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent or trade-marks, or which, if prepared by any formula published or unpublished, are held out or recommended to the public by the makers, vendors or proprietors thereof, as

proprietary medicines, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body."

The latter part of Section 20 of the Act interpreted or construed Schedule "B" as follows:

"The stamp taxes provided for in Schedule 'B' of this Act shall apply to all medicinal articles compounded by any formula, published or unpublished, which are put up in style or manner similar to that of patent, trade-mark, or proprietary medicines in general, or which are advertised on the package or otherwise as remedies or specifics for any ailment, or as having any special claim to merit, or to any peculiar advantage in mode of preparation, quality, use or effect." (*Rucker Rec.*, 451).

To dodge this tax, the Coca-Cola Company immediately began to cut out all references to headache and exhaustion in its advertisements, and every statement or representation therein which it thought could be construed as a holding out that the stuff was a medicine, or a remedy or specific for any ailment.

ASA G. CANDLER:

"Q.—Mr. Candler, you have not used any of the printed matter since the War Revenue Act of 1898, where you advertised that it relieves exhaustion, except in one or two instances, have you? A.—If we have, sir, then the officers of the Government have been able to bring it in here, I reckon. Q.—Explain to the jury why you took that out? A.—So we would not be subject to the War Revenue Tax. Q.—That was the reason? A.—Yes, sir.

Q.—Was your idea that the change in your advertisements would affect the question? A.—We thought so; we thought you folks would not know the difference between headache and disease. Q.—The ingredients were not affected by the change in the advertisements? A.—Not a bit.” (*Rucker Rec.*, 57).

But even after the change in 1898, plaintiff did not absolutely discontinue advertising its stuff as a cure for headache and exhaustion.

ASA G. CANDLER:

“Q.—Mr. Candler, what percentage of your advertising contained any reference to headache and exhaustion in the year '98, in your judgment? A.—Not exceeding five per cent.” (*Rucker Rec.*, 340).

F. M. ROBINSON:

“Q.—How many of them would you say had any reference to headache during 1898? A.—I don't think it would be as much as five per cent., and those would be articles that we had purchased years before and had them on hand and didn't want to throw them away and just let them go out.” (*Rucker Rec.*, 300).

JUDGE JOHN S. CANDLER:

“A.—Of course, as long as that stuff was on hand it was sent out a great deal, but when it was exhausted we had no more made.” (*Rucker Rec.*, 296).

In addition, the old advertisements advertising “Coca-Cola” as a cure for headache and exhaustion, with

which plaintiff had plastered the country from one end to the other, could not be recalled.

ASA G. CANDLER:

"Of course, we couldn't take back the little advertisements stuck up all over the country." (*Rucker Rec.*, 340).

SAMUEL C. DOBBS:

"Q.—When you sent out advertisements declaring then that this was a remedy for headache and nervous exhaustion,—when you began to re-advertise,—you never called in any of those advertisements that had previously gone out? A.—No, sir. The nature of our advertisements is such that we could hardly recall a piece. Q.—You did not try to recall any? A.—We made no effort to recall any. *** Q.—Then the advertisements that had gone out with reference to this 'Coca-Cola' being a cure for headache and nervous exhaustion were still out, so far as you know? A.—Yes, sir. Q.—The Coca-Cola Company, as a corporation, never made any effort to call them in and substitute other advertisements for them? A.—No, sir." (*Rucker Rec.*, 332-3).

A few of the actual advertisements in which "Coca-Cola" was thus held out as a cure for headache and nervous exhaustion, even as late as 1901 and 1902, are thus described by plaintiff's officers:

ASA G. CANDLER:

"Q.—I want to go into the matter of those advertisements. That is one of your advertisements (indicating)? A.—Yes, sir. Q.—That is another?

A.—Yes, sir. *** Q.—Here, in a program of the Lecture Association, January 28th, 1901, appears: ‘Coca-Cola, delightful, refreshing,’ etc., ‘Cures Headache’? A.—That is right. *** Q.—That is another one of yours? A.—Yes, sir. I hate to be showing our dirty linen in court. Q.—That is another? A.—Yes, sir. Q.—And you sent out a glass? A.—Yes, sir. Q.—With the same thing,—that ‘Coca-Cola’ relieves headache, cures exhaustion? A.—That is right.” (*Rucker Rec.*, 269-71).

F. M. ROBINSON:

“Q.—These advertisements in 1901 were not changed? A.—No, sir. Q.—You sent them out? A.—Yes, sir. Q.—Can you give the jury any estimate of how many calendars of 1901 you sent out? A.—I expect we sent out 50,000. Q.—They have got that in them? A.—Yes, sir. Q.—Of these calendars of 1901, you sent out fifty thousand advertising this remedy for headache? A.—Yes, sir. Q.—How many in 1900? A.—Probably the same. *** Q.—There is one in 1899? A.—Yes, sir. Q.—You sent those out for the Coca-Cola Company, didn’t you? A.—Yes, sir. Q.—I will get you to state to the jury if they say anything about relieving exhaustion and curing headache? A.—It says ‘Coca-Cola, delicious and refreshing, relieves mental and physical exhaustion and cures headache.’ Q.—How many of those do you suppose you sent out. A.—I expect fifty thousand. Q.—That was since ’95, wasn’t it? A.—Yes, sir. Q.—You sent out fifty thousand in 1900 that has about the same thing on them? A.—Yes, sir. *** Q.—Here is a little newspaper called ‘Coca-Cola,’ alleged to have been printed in ’98? A.—Yes, sir. Q.—That is since ’95? A.—Yes, sir. Q.—Isn’t it represented

there that it has medicinal properties? *** Let me call your attention to it, what does it say right there? A.—‘Coca-Cola stimulates the brain, revives the body and invigorates the whole system. It is purely a remedial necessity.’ *** Q.—About how many of these were scattered over the country? A.—I expect five thousand, perhaps.” (*Rucker Rec.* 302-3).

JUDGE JOHN S. CANDLER:

“Q.—As a matter of fact, that little tin goes over all packages now? A.—Yes, sir. Q.—State whether or not that says headache and exhaustion? A.—It says it relieves headache and exhaustion. Q.—That goes out now? A.—Yes, sir. Q.—That goes out on all the packages. A.—I think it does. Q.—This program here is dated January 28th, 1902. I will get you to look at that and state to the jury if that is one of your advertisements? A.—Yes, that is an advertisement that we gave the folks who got it up. Q.—What does it state? A.—It says it cures headache. Q.—I present you a calendar of 1900 and ask you if that says it cures headache and relieves exhaustion? A.—Says it relieves mental and physical exhaustion. That is the Lillian Russell picture that we had long before 1898. Q.—You had it in 1900? A.—Yes, sir, I think we did. Q.—Here is one in 1899, isn’t that similar? A.—Yes, that is made from the same plate. *** Q.—Isn’t it true really that you have got it scattered all over this country that ‘Coca-Cola’ relieves exhaustion, and that the soda fountain idea and popular places to sell it,—was not the main and moving reason about advertising it that way, as a relief or specific for these ailments, to sell it? A.—All advertisements are for that, of course. *** Q.—I am trying

to get the moving cause or reason why this thing was ever put in. Wasn't it to sell it? A.—Yes, sir; and all the other advertising.” (*Rucker Rec.*, 296-8).

SAMUEL C. DOBBS:

“Q.—This was sent out after '93, wasn't it? (exhibiting)? A.—Yes, sir. Q.—Hasn't that been on every original package that you sent out, even up to date? A.—Yes, sir. Q.—You have got it on them to-day? A.—Yes, sir. Q.—Doesn't that say it relieves headache and exhaustion? A.—Yes, sir. *** Q.—Look at that, what is that? A.—It is a little stamp book. Q.—What does it say there? A.—It says 'Relieves Exhaustion, Cures Headache,' and 'Cooling and Refreshing.' There, in a much more prominent place, is 'Delicious and Refreshing.' Q.—Turn back over there? A.—'Relieves Exhaustion.' Q.—What else? A.—'Cures headache.' Q.—Then what? A.—'Cooling and Refreshing.' Q.—Which is in big type? A.—'Exhaustion' and 'Headache.' ” (*Rucker Rec.*, 33-7).

Now, we don't have to go far to discover the reason why plaintiff's "Coca-Cola" remedy was held out to be "a valuable brain tonic," "a mental brain stimulant," "a remedial agent for headache and exhaustion," "a medicinal article" for the cure of "all nervous affections," and "a purely remedial necessity." Its ingredients tell the story.

e.—THE INGREDIENTS OF THE ORIGINAL "COCA-COLA."—

(1) Fluid Extract of Coca.

That fluid extract of coca was one of the leading in-

gredients, and, no doubt, the chief “medicinal” agent, is admitted.

F. M. ROBINSON, who was one of the incorporators of the old Pemberton Chemical Co., and a stockholder and director therein, and, as such, was associated with Dr. Pemberton in the manufacture of “Coca-Cola” from its incipency, said:

“We [the Pemberton Chemical Co.] commenced making what we called ‘Coca-Cola’ in May, 1886. I was assisting in the manufacture of ‘Coca-Cola.’ (Rec., 348) *** No. sir, I don’t remember who it was we bought our *fluid extract of coca* from at that time. We bought coca leaves and made it ourselves. No, sir, I cannot remember the process by which we extracted or made the *fluid extract of coca*. Dr. Pemberton was the chemist in the matter.” (Rec., 356)

In July, 1887, Dr. Pemberton attempted to sell a two-thirds interest in “Coca-Cola Syrup & Extract,” as it was then called, to George S. Lowndes and Willis E. Venable, and agreed to furnish them “all knowledge and information necessary for the manufacture of ‘Coca-Cola Syrup & Extract,’ ” and to sell them, at original cost, “all the material” necessary “for the manufacture of ‘Coca-Cola Syrup & Extract’ ” so they could begin the manufacture at once and not have to wait for the necessary supplies to come from New York. (*Plaintiff’s Exhibit 78*)

F. M. ROBINSON:

“Q.—To your knowledge, did Pemberton actual-

ly deliver the material to Lowndes and Venable for manufacturing 'Coca-Cola'? A.—Yes, sir." (Rec., 393) *** "In referring to the fact that all the '*material*' for making 'Coca-Cola' " was thus delivered, "I mean coca leaves, *fluid extracts*, cola nuts, percolators, and everything of that kind,—everything that was used in the manufacture." (Rec., 365)

An itemized invoice of all the "material" thus sold and delivered to Lowndes and Venable is in evidence as *Plaintiff's Exhibit 79*.

WILLIS E. VENABLE:

"The paper marked *Plaintiff's Exhibit 79*,—that's a paper that was turned over to us when we bought these things. *** I don't remember just what there was, but there was a lot of stuff that was used in the manufacturing of 'Coca-Cola' that was turned over to us with this paper. (Rec., 388). *** I don't think there was anything left there [at the Pemberton Chemical Company's place of business] that was used in the making of 'Coca-Cola.' " (Rec., 392).

GEORGE S. LOWNDES:

"Of course, *Plaintiff's Exhibit 79* followed the purchase, being an invoice of the stock of goods on hand which I bought from them with this purchase there. As far as I can remember, all the goods described in there were turned over and checked off. You can find the check marks on there." (Rec., 515).

This invoice, therefore, contains an authentic list of

the ingredients that were used at that time in the manufacture of "Coca-Cola." The "medicinal" agents are there shown to be,—

“40 lbs. Fld. Ex. Coca Leaves

23 oz. Mercks Caffeine.”

—and the flavoring extracts and aromatics are shown to be,—

“8 lbs. Phospho. Acid

5 lbs. Citric Acid

1 lb. Elixir of Orange

$\frac{1}{2}$ lb. Fluid Extract of Nutmeg

15 oz. Oil of Lemon

10 oz. Extract of Vanilla

5 oz. Oil of Spice

5 oz. Oil of Nutmeg

1 oz. Oil of Cinnamon True

$\frac{3}{4}$ oz. Oil of Corriander

$\frac{3}{4}$ oz. Oil of Nerolie.”

Pursuant to the agreement to furnish “all knowledge and information necessary for the manufacture of ‘Coca-Cola Syrup & Extract,’ ” Dr. Pemberton gave Lowndes and Venable a copy of the formula.

GEORGE S. LOWNDES:

“I had a copy of the ‘Coca-Cola’ formula, Dr. Pemberton gave us a copy.” (Rec., 519).

After this purchase, Venable did the manufacturing for the firm, while Lowndes attended to the financial end of the business. (Rec., 519-520).

WILLIS E. VENABLE:

“After we bought it, I actually made it myself. I

bought my cocoa from Jacobs there,—maybe I got him to order it for me, and the caffeine, I got him to order that also, from New York, in ten pound cans. I took the coca leaves and made my *fluid extract of coca* myself by percolation,—made many a gallon besides what I made for the ‘Coca-Cola,’ before that and since,—they used that in the drug business, and I have been in the drug business *** all my life.” (Rec., 393).

A. O. MURPHY, who, as a member of the Pemberton Medicine Co., (*Defendant’s Exhibit 22*) was associated with Dr. Pemberton in the manufacture and sale of “Coca-Cola” (Rec., 1280-2):

“The way we used to make that product, we took the actual extract from coca leaves,—it was black as tar and strong enough to knock a bull down. *** We bought the actual leaves themselves.” (Rec., 1285).

ASA G. CANDLER, who was himself a druggist (Rec., 372), and, of course, knew how to make fluid extract of coca, admits that after he became connected with “Coca-Cola” and began to make it, he used fluid extract of coca as one of the ingredients:

“After I began to make this ‘Coca-Cola,’ I have no recollection from whom I bought my *fluid extract of coca*,—I didn’t buy it from anybody, I made it myself. I made it from coca leaves, of course,—I can say that positively, you know.” (Rec., 380). *** This fluid extract of coca that I refer to was derived from coca leaves,—Erythroxylon coca *** I bought them on the market, of course.” (Rec., 381).

Fluid extracts are "concentrated alcoholic, or hydro-alcoholic, solutions of vegetable principles, which are permanent and represent *all the active virtues* of the drugs from which they are made."¹⁴ In other words, they are concentrated solutions of the active principles of drugs. In the case of coca leaves, the fluid extract is a concentrated hydro-alcoholic solution of the active principle of the leaves,—cocaine. Fluid extract of coca is an official preparation, listed in the Pharmacopoeia¹⁴ and in the Dispensatory,¹⁴ and its strength in cocaine has been standardized at 0.5 of a gramme of cocaine (7.7 grains) to each 100 cubic centimetres of the liquid.¹⁴ Fluid extract of coca, therefore, is a definite pharmaceutical preparation and means literally a liquid extract consisting of a definite weight of cocaine dissolved in a definite volume of 50% alcohol.¹⁴

The fluid extract of coca that plaintiff used was no exception to the rule. The process by which plaintiff made it is described in detail by Asa G. Candler (Rec., 420, 421) and by Charles Howard Candler (Rec., 441, 442, 445). Dr. H. C. Fuller, plaintiff's chief chemist, when asked what would be extracted from the coca leaves by this process, replied:

"If the coca leaves were the ordinary Erythroxy-lon coca, you would get from the coca leaves *cocaine* and the *light alkaloids*, tannin, and probably a little chlorophyll, and any mineral matter that was present soluble in the alcohol mixture, and possibly a little protein matter." (Rec., 2356).

¹⁴See Foot Note 12, ante.

The cocaine was the main thing; the other substances that came out were just impurities.

DR. JOSEPH JACOBS, who, as a member of the firm of Walker, Candler & Co., was associated with Asa G. Candler in the manufacture and sale of "Coca-Cola" from about April 14th., 1888, to April 22nd., 1891, said:

"Yes, I was a member of the firm of Walker, Candler & Co. *** Yes, I am a chemist. 'Coca-Cola' was made by one of the soda water men, not and what entered into it. Yes, sir, I knew the formula and what entered into it. *** Well, it was made from coca leaves then. At that time '*Coca-Cola*' had in it only such cocaine as would be contained in the coca leaves. Besides cocaine, coca leaves have in them extractive matter,—cocaine is the only thing of any importance. At that time '*Coca-Cola*' had just such cocaine in it as came from the coca leaves. I don't know whether it has since been changed or not,—it wasn't during my connection with it. My connection with 'Coca-Cola' ceased, unfortunately, with the transfer of that paper" [the assignment from Walker, Candler & Co., per Joseph Jacobs, to Asa G. Candler, dated April 22nd., 1891, *Plaintiff's Exhibit 76*]. (Rec., 409-10).

SAMUEL C. DOBBS, Vice-President and Sales-Manager of the Coca-Cola Co., (testifying in the second *Rucker* case, in 1903):

"I know what is in 'Coca-Cola.' *** It has quite a number of aromatics, *cola* (?) [coca] leaves, caffeine, and a slight trace of *cocaine*." (*Rucker Rec.*, 394).

ASA G. CANDLER, President of the Coca-Cola Co.,
(testifying in the first *Rucker* case, in 1902):

“Q.—There is *cocaine* in it? A.—*A very small proportion.*” (*Rucker Rec.*, 268).

Naturally the proportion of cocaine to the other ingredients,—the sugar, for example, or the flavoring extracts,—would be small; but it was nevertheless there in sufficient quantity to act as “a valuable brain tonic” and a “mental brain stimulant,” and to make the goods “popular” by its habit-forming propensity.

DR. JOSEPH JACOBS:

“Q.—A preparation that has the combination of caffeine and cocaine in it, however so little or however so great, wouldn't you regard it as a medicinal preparation? *** A.—In minute proportions I don't regard it as a medicinal compound. Q.—What part would these things play in it? A.—Simply having an exhilarating effect in the beverage. Q.—That would play that much? A.—Yes, sir.” (*Rucker Rec.*, 319).

ASA G. CANDLER:

“Q.—Why does it cure headache? A.—Because it is a mental brain stimulant, it relieves and quiets the brain. *** Q.—If this is purely and simply a refreshing soda fountain beverage, state why you put this preparation known as the tincture that you make of coca leaves and cola nuts in ‘Coca-Cola’? *** A.—In both of those there are ingredients we very much appreciate—that make our goods popular. Q.—If it is simply a beverage, why do you put

these medicinal beverages in? A.—To make it popular.”¹⁵ (*Rucker Rec.*, 267).

¹⁵“Because of the pleasant effects which cocaine produces when taken hypodermically, or by the mouth, the cocaine habit is not rarely met with, many persons becoming slaves to the use of this drug.”—**NATIONAL STANDARD DISPENSATORY**, (Lea Bros. & Co., Philadelphia, 1905) Page 449.

“When taken internally cocaine is a mental stimulant, and moderate doses usually causes a pleasant sense of exhilaration and temporary increase of physical and mental power.”—**THE AMERICANA** (The Americana Co., N. Y., 1917) Vol. 5, title, “Cocaine.”

“Since the introduction of cocaine into general therapeutic use, numerous cases of the formation of a habit similar to that of opium or morphine have been recorded. *** A wine containing coca extract is often used in domestic medicines as a ‘general tonic’ and has rapidly given rise to the cocaine habit.”—**PHARMACOLOGY & THERAPEUTICS, OR THE ACTION OF DRUGS**, (Lea Bros. & Co., Philadelphia & New York, 1906) pp. 306 309.

“The cocaine habit is of more recent growth than that of morphine, and it claims an increasing number of victims. Erlenmeyer has recently called it the third surge of humanity. As an enslaving drug it is the most insidious, the most rapid in its conquest, the most demoralizing in its effect, and the most permanent in the marks it leaves on the patient should he long survive its use. **A common method of acquiring the habit is by means of medicated drinks and sweets**, such as wines, coca, voice lozenges and the use of a nasal spray.”—**NELSON’S ENCYCLOPAEDIA**, Perpetual Loose Leaf Edition (Thomas Nelson & Sons, New York) Vol. 4, p. 141, Title, “Drug Habits.”

“The recent investigations of the United States Department of Agriculture have shown conclusively a constant increasing use of injurious drugs among the people of this country. According to reports made by the Government agents, fully 2,000,000 persons are addicted to drug habits, some using morphine, cocaine or opium, the most dangerous of all, while others are the victims of soothing syrups, and other mixtures commonly advertised as ‘cures’ and ‘remedies,’ but which, owing to the presence of injurious drugs, injure both the mind and body of the consumer by causing him to acquire the habit of using them. As the result, the campaign of the Government is directed largely against this form of drug taking. During 1910 the first of a **series of pamphlets was issued by the Department of Agriculture** warning the people against the use of habit forming drugs, and **calling particular attention to the drinks containing cocaine frequently served at soda fountains**. Prior to the appearance of this report, **the authorities had forbidden the sale of certain popular beverages for this reason**, and the manufacturers were not permitted to supply orders again until they had **changed their formulas** to the satisfaction of the Bureau of Chemistry. Not only has the United States Government taken this matter up, but the health officials in nearly all the larger cities are taking steps to prevent the sale of such drugs in any form. In New York City alone several druggists and other dealers in habit forming drugs have been arrested and convicted; yet, in spite of the efforts at suppression it is known that large quantities of cocaine are still consumed by those addicted to this habit, and that other drugs are frequently used. In view of Secretary Wilson’s charge that druggists, physicians, and patent medicine manufacturers were largely responsible for this new scourge to humanity, the revision committee of the American Pharmaceutical Association, which met in May, 1911, investigated and passed unfavorably upon a number of these so-called ‘remedies.’ Both the Fed-

That pure commercial caffeine, manufactured in the United States and obtained by chemical extraction from tea, was the other "medicinal" agent in the original "Coca-Cola," is also admitted.

SAMUEL C. DOBBS:

"Q.—Isn't it true that you use in the preparation of this compound, in addition to the things I have just called over, crude caffeine? A.—We use pure caffeine. Q.—You use, in addition to the things I have mentioned, pure caffeine? A.—Yes, sir. Q.—What sort of looking stuff is that,—isn't it a white powder? A.—It is a white crystalline powder." (*Rucker Rec.*, 395). *** "Q.—How much pure caffeine do you put into this preparation? A.—About 170 grains to 1 gallon of syrup." *** (*Rucker Rec.*, 396).

eral authorities and the health officials of the several states have determined to pursue a definite campaign against the sale of pernicious drugs along practically the following lines:

"(1) To educate the public, through the press as well as by lectures, pamphlets, etc. (2) To secure the enactment of laws forbidding the sale of habit-forming drugs, and preparations containing them, except on the prescription of duly authorized persons. (3) To require a permanent record to be kept of all transactions in such drugs, whether by prescription or otherwise, the same to be subject to Federal and State inspection at all times. (4) The enactment of laws forbidding the handling of such drugs except by druggists, manufacturers, and others legally qualified. (5) To secure the passage of laws permitting the State Boards of Health to revoke the licenses of physicians or druggists convicted of selling such drugs for other than legitimate purposes. (6) To secure the passage of a Federal law prohibiting the interstate shipment of habit-forming drugs, or preparations containing them except through the regular channels of trade in which records of all transactions must be kept. ***

"In Bulletin No. 393, published by the Department of Agriculture, Dr. Kebler states that the widespread development of the cocaine habit in the United States has been far more detrimental than the use of opium in China. While the statistic regarding this subject are by no means complete, they are sufficient to show that the use of cocaine in this country has already extended to a greater percentage of the people than has opium, even in China. Not only may the drug be obtained by itself, but many patent medicines depend upon it for their effects."—**THE AMERICANA** (The Americana Co., New York, 1917), Vol. 7, title, "Drug Habits."

The Harrison Anti-Narcotic Act was one of the results of this movement.

(2) CAFFEINE.

ASA G. CANDLER:

"Q.—When did you begin to put pure caffeine into 'Coca-Cola'? A.—In 1888. Q.—And have been using pure caffeine all this time? A.—As pure as we could get it." (*Rucker Rec.*, 428).

SAMUEL C. DOBBS:

"Q.—The caffeine you buy, where does it come from? A.—Mostly from tea, because it is cheaper. Q.—That is made out of tea, most of it? A.—Yes, sir, most of it that is made in the United States is made from tea, obtained from the tea packing houses."¹⁶ (*Rucker Rec.*, 399).

DR. J. J. KESSLER:

"Cola nuts are not used in preparing caffeine to my knowledge in this country. I believe the greater amount of caffeine which is made in this country is made from tea leaves. *** It [the tea leaf] runs higher in caffeine."¹⁷ (*Rec.*, 2468-2469).

This pure caffeine was used in the preparation for its stimulating effect.

SAMUEL C. DOBBS:

"Q.—Do you know what caffeine is used for? A.—Yes, sir. Q.—What? A.—It is a cerebral stimulant." (*Rucker Rec.*, 396).

¹⁶"The Pharmacopoeias allow its preparation from either coffee or tea, but commercially it is prepared almost exclusively from tea and 'tea dust' or 'sweepings.'"—**NATIONAL STANDARD DISPENSATORY** (Lea Bros & Co., Phila., 1905) p. 330.

¹⁷"Tea yields 2 to 4 per cent."—**CENTURY DICTIONARY & CYCLOPAEDIA**, Vol. 2, p. 6271.

"Caffeine * * * forms the stimulating principle * * * in tea, where it forms 2 to 4 per cent."—**NELSON'S ENCYCLOPAEDIA**, Perpetual Loose Leaf Ed., Vol. 2, p. 431.

"The (cola) nuts contain from 0.7 to 0.2 per cent. of the alkaloid caffeine." — **THE NEW INTERNATIONAL ENCYCLOPAEDIA**, (Dodd, Mead & Co., N. Y., 1913) Vol. 5, p. 129.

"Caffeine.—A substance found in the leaves and beans of the coffee tree, in tea, in Paraguay tea, and in small quantities in cocoa and in the cola nuts."—**ENCYCLOPAEDIA BRITANNICA**, 11th Ed. (1910), Vol. 4, p. 945.

Being one of the two "medicial" agents, it would have been impossible to make the tonic without it.

SAMUEL C. DOBBS:

"It would be impossible to make 'Coca-Cola' without it." (*Rucker Rec.*, 403).

But, while this is admitted, it is strenuously insisted that cola nuts were actually used in the preparation, or, rather, that the extract of cola was used; and, hence, that the presence of the word "Cola" in the name of the compound, and the representation in plaintiff's advertisements that its remedy was made from the "crude African cola nut," were justified.

Thus, at the first trial of the *Rucker case*, in 1902, before the fact was brought out that pure caffeine extracted from tea was used to give the preparation its caffeine effect, Asa G. Candler, when asked to state the ingredients of "Coca-Cola" and to describe how it was made, said:

"We take what we know as coca leaves and cola nuts. Those are the two leading ingredients. We call it 'Coca-Cola.' *** Those two articles are ground up and made by percolation. *** We put them in a large percolator, mix it, and it is made into a compound tincture. *** We also take several flavoring articles, including lemon and vanilla, and they are put in the proper caldron and made into what we call 'Coca-Cola.' " (*Rucker Rec.*, 259).

And again:

"Q.—Well, now, what has 'Coca-Cola' got in it?
A.—Cola nuts, the leading ingredient, cola nuts; we

use it for its caffeine effect.” (*Rucker Rec.*, 262).

And F. M. ROBINSON, testifying in the case at bar, said:

“The syrup was given this name on account of the extracts which it contained, ‘coca’ and ‘cola,’ made from coca leaves and from the cola nut.” (*Rec.*, 354).

And both Asa G. Candler (*Rec.*, 421) and his son, Charles Howard Candler (*Rec.*, 441), in describing the process by which the fluid extract of coca (or the compound tincture of coca and cola, as Asa G. Candler called it in the *Rucker* case) was made, said:

“We buy the whole leaf (meaning the coca leaf) in bales and grind it in a mill; we also buy cola nuts, and mix them,—I have forgotten the proportion, it has been so long,—in a percolator.”

If it had really been true that cola nuts were actually used in the preparation, and, in truth, constituted one of the leading ingredients, then the stuff would undoubtedly have been truly a preparation of coca and cola, and the name “Coca-Cola” would have been a concise and truthful description of the article, and as apt and appropriate a description as could well be imagined.

But it is reasonably certain that no cola nuts were ever really used at all, the two Candlers and Robinson to the contrary notwithstanding; and it is absolutely certain that, if any were used, the quantity was so trifling as to have no effect upon the preparation one way or another. If used at all, they were used merely as a subterfuge to

lend color to the statement that plaintiff's product was essentially a mixture of coca and *cola*, and, therefore, truthfully described as "Coca-Cola," and for no other purpose whatever.

It is admitted that the only thing of any importance in cola nuts is caffeine.

SAMUEL C. DOBBS:

"Q.—Are there other properties, Mr. Dobbs, which constitute cola nuts besides caffeine? A.—There are three or four remote properties,—theobromine is one, but I have forgotten the others. *** They are of no importance." (*Rucker Rec.*, 398).

It is admitted that the only purpose for which cola nuts were used was for the effect of the caffeine which they contain.

ASA G. CANDLER:

"Q.—Mr. Candler, are cola nuts drugs? A.—Yes, sir. Q.—And a medicine? A.—Yes, sir. Q.—And used that way? A.—Yes, by us. (*Rucker Rec.*, 432). *** Q.—What has it [the cola nut] got in it? A.—Caffeine. *** We use it for its caffeine effect. *** Q.—What makes coffee, good coffee? A.—Caffeine. Q.—Likewise tea? A.—Same thing." (*Rucker Rec.*, 262).

SAMUEL C. DOBBS:

"The percentage of caffeine in cola nuts *** fixes the value of those nuts. (*Rucker Rec.*, 398). *** That is one of the conditions of the order." (*Rucker Rec.*, 405).

It is admitted that caffeine is identically the same substance chemically, and produces identically the same effect physiologically, whether it comes from coffee, tea or cola nuts.

SAMUEL C. DOBBS:

“Q.—I’ll get you to state whether there is any chemical difference in the caffeine, whether you get it from coffee, tea, or cola nuts? A.—Absolutely none. Q.—Chemically, it is identical, wherever you get it? A.—Yes, sir. Q.—If you got enough from cola nuts, there is no difference in the same quantity of pure caffeine? A.—Not at all, except it is more trouble.” (*Rucker Rec.*, 400).

ASA G. CANDLER:

“Q.—What difference does it make as to the effect of the ‘Coca-Cola,’ as to the source from which the caffeine comes? A.—None that I know of. (*Rucker Rec.*, 432). *** All caffeine is caffeine, I don’t care where you get it.” (*Rucker Rec.*, 429).

And it is admitted that the pure caffeine was put into the preparation because cola nuts, or the extract of cola, could not begin to supply enough caffeine to have the desired effect.

SAMUEL C. DOBBS:

“Q.—Do you know why the ‘Coca-Cola’ people put crude caffeine into this preparation? A.—They put pure caffeine into the ‘Coca-Cola’ to bring up a certain amount of caffeine in a drink, because the cola nuts *** do not run uniformly in percentage of strength,—no crude product does,—and, in order to make the amount of caffeine necessary to make a

drink, it is necessary for us to use pure caffeine." (*Rucker Rec.*, 396). *** It would be impossible to make 'Coca-Cola' without it." (*Rucker Rec.*, 403).

ASA G. CANDLER:

"I told you before, I wanted so much caffeine in every glass, and no more. *** The cola nuts would not have enough of it." (*Rucker Rec.*, 428).

Of course, if enough of the extract of cola could be used, undoubtedly enough caffeine could be supplied by that means; but it is admitted that it would not be practicable to supply it that way, because of the enormous quantity of the extract that would have to be used. The extract of cola contains so little caffeine and so much liquid that it would be about as practicable to supply the caffeine by that means as it would be to try to sweeten your coffee with a spoonful of sugar dissolved in a gallon of water.

SAMUEL C. DOBBS:

"It would not be practicable to make a syrup and use entirely cola nuts, we would have too much liquid." (*Rucker Rec.*, 400).

Besides, the extract of cola contains a lot of impurities, which make its use highly objectionable.

SAMUEL C. DOBBS:

"Q.—If you have a large quantity of cola nuts ground up, and a quantity large enough to give the 'Coca-Cola' the same stimulating effect, you would also get tannin and a lot of other things bad for the stomach? A.—We would get a great deal of *tanna*

[tannin], and we have too much liquid; it would take a long time to get the proper proportions to make the syrup." (*Rucker Rec.*, 400). *** "Q.—You stated *** that you used the pure caffeine to avoid the bad effects of so much cola nuts, didn't you? A.—It would be impossible to make 'Coca-Cola' without it. Q.—Didn't you state a while ago that you used pure caffeine to avoid the bad effects? A.—You would get too much tannic acid." (*Rucker Rec.*, 403).

The point Dobbs was here trying to bring out was stated with even greater clearness by Dr. G. F. Payne, a witness for the Coca-Cola Co., at the second trial of the "*Rucker* case in 1903, who on direct examination, in answer to the question as to what conceivable difference it could make whether the caffeine were put into "Coca-Cola" as pure caffeine, or got in through the medium of crude cola nuts, said:

"Of course, there is one objection to the use of the crude drug. In making preparations, chemists and pharmacists the world over, in this and every other business in manufactured products, try to get the concentrated article that they desire. In the case of sugar cane, instead of using ground up sugar cane, we extract the sugar. Instead of using bones, we use phosphoric acid, and in the case of cola nut, or tea, or coffee, if we wish the caffeine, we naturally extract it and use that, and leave the foreign matter. The cola nut contains about 42 per cent. of starch, which would interfere with the making of a nice liquid, because it would make it muddy and ugly. (*Rucker Rec.*, 435). *** The beverage, made up of caffeine, and eliminating the other stuff, would be more palatable than if made up with the

crude material. In fact, we do everything we can to eliminate that. Q.—If enough cola nut was put in to give it [the] strength, say of a good strong cup of coffee, how much of the thick woody and foreign matter would get into the liquid [that] would endanger the stomach of those using it? A.—You would get a good deal of foreign matter that would not be very pleasant to take; and, in fact, you would have to filter it out. Our first efforts were to make tinctures, and thus get at the soluble matter and leave the crude stuff behind. The next process has been the making of fluid extracts, and that is more concentrated still. *** Now we go further than that and extract the active principle. (*Rucker Rec.*, 436). *** Q.—What would you judge to be the better soda water drink, with pure caffeine in it, or coming through the medium of the cola nut? A.—Of course, the pure caffeine makes the more elegant and palatable preparation.” (*Rucker Rec.*, 438).

Under these circumstances there does not seem to have been any good reason why plaintiff should have used cola nuts at all, in any quantity, except as a sop to its conscience and to justify the false description of its product as a preparation of cola nuts.

SAMUEL C. DOBBS:

“Q.—Explain * * * why you used cola nuts at all? A.—Because we want to. It is the trade formula. Q.—That is your reply to the question,—simply because you want to? A.—Yes, sir. (*Rucker Rec.*, 404).

As will be shown later on in discussing the composition of the present day “Coca-Cola,” the amount of pure

caffeine which plaintiff used in making its syrup.—170 grains to the gallon,—which figures out 1.3 grains to the ounce,—was 700 times as much as could have been obtained from the best specimens of cola nuts if cola nuts had been used. (Rec. 2471). Plaintiff admits that the percentage of caffeine in an ounce of its syrup was about 1.2 grains, so that the amount of caffeine present in an ounce of the syrup, due to cola nuts, if cola nuts had actually been used, would have been only 1-700 of 1.2 grains, or, in round numbers, 1-600 of a grain. Dr. John A. Wesener (plaintiff's chemist) admits that "1-400 of a grain of caffeine is not an appreciable quantity of caffeine." (Rec. 932).

The amount of caffeine present in cola nuts varies with each nut, as Samuel C. Dobbs admits:

"Q.—State whether or not cola nuts, as imported, vary in strength? A.—They do. (*Rucker Rec.*, 400). * * * Cola nuts * * * do not run uniformly in percentage of strength,—no crude product does." (*Rucker Rec.*, 396).

If the quantity of caffeine that could have been obtained from cola nuts had been appreciable, then, in order to maintain a definite, uniform percentage of caffeine in each drink, as plaintiff admits it endeavored to do, it would have been necessary to vary the proportion of pure caffeine, putting in less when the cola nuts ran high in caffeine, and more when they ran low in strength. But the truth is that the caffeine supplied by the very best specimens of cola nuts is so thoroughly inappreciable that plaintiff did not find it necessary to vary the proportions of pure caffeine one iota.

SAMUEL C. DOBBS:

"Q.—Now, you have been asked whether so many thousand pounds of caffeine had not been put in 'Coca-Cola.' I will ask you to state whether or not it has been put in, in the proportion you stated, namely, 171 grains to the gallon, or not? A.—Yes, sir. Q.—Has that been the proportion all along? A.—Since 1893." (*Rucker Rec.*, 402).

That the formula did not call for cola nuts, and that none were ever used, seems very evident. Samuel C. Dobbs was asked at the second trial of the *Rucker* case how much pure caffeine the Coca-Cola Company had bought and used in the manufacture of its "Coca-Cola" preparation since the former suit, and he was able to answer right off, and to produce the invoices showing the purchases. Thus:

"Q.—Mr. Dobbs, isn't it true *** since this tax was paid in the former suit, that you have put into this preparation known as 'Coca-Cola' in the aggregate 13,940 pounds of pure caffeine? A.—Yes, sir, that is about the right amount. (*Rucker Rec.*, 396). *** You have got these figures. We gave you these figures ourselves. (*Rucker Rec.*, 397). *** The original invoices are here in the package." (*Rucker Rec.*, 398).

But he was not able to even approximate the quantity of cola nuts purchased, and stated that it would be impossible to find out. Thus:

"Q.—Where do you get the cola nuts? A.—They are imported from South Africa. *** Q.—How much have you imported from August 1, 1899, to July 1, 1901? A.—I don't know, sir. I

couldn't find out if I wanted to. *** We keep no purchase ledger. Q.—Why don't you keep that account? A.—Simply because it is work for nothing. We have enough work without keeping that kind of a record. Q.—Then you have no means of knowing? A.—It would be impossible to find out." (*Rucker Rec.*, 397).

If any had been purchased, it is reasonably certain that a highly organized manufacturing concern like the Coca-Cola Company would have had a complete record of every purchase, just as it had of every pound of caffeine that it bought, and the fact that plaintiff had no records to show that it had purchased any cola nuts, is a very good indication that none were purchased or used. This is confirmed by the other evidence in the case.

F. M. Robinson, in speaking of the ingredients for making the original "Coca-Cola," which Dr. Pemberton turned over to Lowndes and Venable, in July, 1887, said:

"In referring to the fact that all the "material" for making 'Coca-Cola' was removed, I mean coca leaves, fluid extracts, *cola nuts*, and everything of that kind,—everything that was used in the manufacture." (*Rec.*, 365).

But the itemized invoice giving the list of ingredients thus turned over (*Plaintiff's Exhibit 79*), and setting out in black and white just exactly what was used in the manufacture of the original "Coca-Cola," makes no mention of any cola nuts, but mentions only "23 Oz. *Merck's Caffeine*." And F. M. Robinson admits that

“at that time cola nuts, or the extract of cola, was a very expensive article and very little in use” (Rec. 358), and that “the fact of the business is, it has been so long ago that my recollection of what did go to Lowndes and Venable,—it is hard to remember that far back, and my recollection is very hazy on that.” (Rec., 366).

WILLIS E. VENABLE admits that, in making “Coca-Cola” according to the formula Dr. Pemberton gave him, he used only pure *caffeine*, and not any cola nuts:

“I bought my coca from Jacobs there,—maybe I got him to order it for me, and the *caffeine*, I got him to order that, also, from *New York* in *ten pound cans*.” (Rec., 393).

In enumerating the ingredients of “Coca-Cola” as made during the period when he was connected with it, Dr. Joseph Jacobs said (testifying in the *Rucker* case in 1902):

“Q.—Do you know what is in ‘Coca-Cola’? A.—Yes, sir. Q.—What? A.—If I can recall it, it was *caffeine*, and a solution or decoction of cocaine leaves, and aromatic ginger, and some flavoring.

*** Q.—A decoction of coca leaves? A.—Yes, sir. Q.—What else? A.—*Caffeine*. Q.—What else? A.—Ginger and some flavoring, I think vanilla. Q.—Cocaine? A.—No, sir. Q.—Not a bit of cocaine? A.—Such as is in the coca leaves.” (*Rucker Rec.*, 316).

If cola nuts had formed one of the ingredients, certainly Dr. Jacobs would not have failed to mention the fact.

SAMUEL C. DOBBS also enumerated the ingredients of "Coca-Cola" (at the second trial of the *Rucker* case in 1903) as follows:

"I know what is in 'Coca-Cola,' *** It has quite a number of aromatics, *cola* (?) *leaves*, *caffeine* and a slight trace of cocaine." (*Rucker Rec.*, 394).

While he used the word "*cola*" leaves, he evidently meant "*coca*" leaves, because "*cola*" is not a *leaf*, but a hard, woody *nut*.

Now, while caffeine is the only thing of any importance in the cola nut, still cola nuts and caffeine are different articles.

DR. H. C. FULLER:

"Q.—Explain the difference between extract of cola and pure caffeine? A.—Well, extract of cola is a solution of the ingredients, or it may be a solution of all the ingredients obtained by extracting cola by alcohol and water. *** That, of course, includes caffeine and a number of other ingredients, common matter, volatile and other substances. Now, caffeine is one of these constituents, [but] when it is obtained alone and purified it is not an extract of cola, *which* [but] is identical with caffeine which is obtained from 'coffee, tea, *durana* [guarana]. Q.—There is a difference between extract and pure caffeine? A.—Yes, sir." (*Rec.*, 2380)

DR. CHARLES E. CASPARI:

"That is perfectly analogous to extract of vanilla, which contains, as its chief ingredient, vanillin; and yet, if you make a solution of vanillin in alcohol and water, it is not identical with the odor

of extract of vanillin [vanilla], because one is a single substance and the other is a blend." (Rec., 914)

Whether the pure caffeine was just as good, for the purpose intended, as the cola nuts,—or even better,—is not the question. It is a fraud to deceive the public, even for their own benefit. Plaintiff represented its product as being composed of the "crude African cola nut," when, in fact, it was composed of pure caffeine extracted from tea. Whether this was a dangerous deception,¹⁸ or only a harmless humbug, is not important. It was a fraud, and, as Judge Taft said in the *Syrup of Figs* case (73 Fed., 816), it was a fraud "of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of, and is dependent upon, such deceit." That the misrepresentation was a material one may be inferred from the fact that plaintiff so regarded it. A deliberate design to deceive the public, and actual deception of purchasers, are admitted.

ASA G. CANDLER:

"Q.—Isn't it true that the wording of the advertisements, and the language that gives it the most sale, is the emphasis you have in your advertisements, and the stress laid upon the fact, that you use

¹⁸"Caffeine *** if taken in moderate doses, has the effect of causing the blood pressure and stimulating the cerebrum, thus increasing the reasoning power and the imagination. *** Large quantities, however, are liable to cause a trembling of the muscles, and toxic doses have the effect of paralyzing the heart."—**THE NEW INTERNATIONAL ENCYCLOPAEDIA**, (Dodd, Mead & Co. N. Y., 1913) Vol. 3, p. 788.

THE INGREDIENTS OF THE PRESENT-DAY "COCA-COLA."—**"Merchandise No. 5."**—

the crude African cola nut in your preparation? A.—Yes. (*Rucker Rec.*, 429). *** Q.—I will get you to state *** whether you disclosed, by advertisement or otherwise, up to the time the Government discovered it in the last suit, the fact that you used pure caffeine, instead of the caffeine in the cola nut? A.—I don't think we ever directly alluded to that fact at all. (*Rucker Rec.*, 431). *** Q.—And nobody on earth, so far as you know, knew what went into that preparation except the 'Coca-Cola' people? A.—I should think not. Q.—Has it not been your purpose and effort to keep anybody from knowing it? A.—Yes, sir." (*Rucker Rec.*, 429).

Charles Howard Candler, Vice-President of The Coca Cola Company, tells what plaintiff's so-called "Coca-Cola" now consists of:

"There are eight ingredients, or groups of ingredients, that enter into the mechanism of 'Coca-Cola' syrup. One ingredient is burnt sugar coloring, or caramel; one is sugar; one is phosphoric acid; one is lime juice; one ingredient is caffeine, and is put in in the pure state; one consists of flavoring oils dissolved in alcohol. There are a number of flavoring oils in that extract,—they are concentrated oils and have a strong flavor. In addition to that we put glycerine into the syrup, and a product which we call 'Merchandise No. 5.' *** We put water in 'Coca-Cola,' too; that makes nine ingredients." (*Rec.*, 442-3)

The ingredients described as "Merchandise No. 5" is the only one that is pretended to supply any of the properties of either coca or cola to the preparation. It is supposed to contain a tincture of coca and cola, minus

the cocaine; but, as a matter of fact, it contains nothing derived from cola nuts, and practically nothing derived from coca leaves. It is chiefly just 20% alcohol. Its presence in the preparation has no effect one way or the other on its medicinal character, or even its taste. It is used simply as a subterfuge to justify the continued use of the term "Coca-Cola" as applied to a product which is not "Coca-Cola."

The substitution of this "Merchandise No. 5" for the fluid extract of coca of which the original article was chiefly composed, was brought about by the following circumstances:

On June 30th., 1906, Congress passed the Food & Drugs Act [34 Stat. L. 768; 3 Fed. Stat. Ann. (2 Ed.), 379; 1909 Supp., Fed. Stat. Ann., 136], prohibiting the adulteration and misbranding of food and drugs, and, in Sec. 8 of the Act, defined what was meant by "misbranding," in part, as follows:

"That for the purposes of this Act an article shall be deemed to be 'misbranded' *** if it fails to bear a statement on the label of the quantity or proportion of any morphine, opium, *cocaine* *** or any derivative or preparation of any such substances, contained therein."

To avoid having to print on its labels a statement of the quantity or proportion of cocaine contained in "Coca-Cola," plaintiff decided to revise its product and eliminate the cocaine.

ASA G. CANDLER:

"It immediately adopted another method of treating the leaves, which this deponent is informed and believes entirely eliminates all traces of cocaine." [Affidavit of Asa G. Candler, made and filed in *Coca-Cola Co. v. Nashville Syrup Company*, in the U. S. District Court, at Nashville, in 1911] (Rec., 1129).

Practically, that involved the elimination of coca altogether as an ingredient. The only function the fluid extract of coca performed was to impart to the preparation the "tonic and nerve stimulant properties" of "the wonderful coca plant,"—that is, to supply enough cocaine to act as a 'mental brain stimulant,' and to make the goods "popular,"—but with these valuable "tonic and nerve stimulant properties" eliminated, the denaturalized, or "decocainized," extract thus resulting was wholly incapable of producing any effect whatever, and, therefore, incapable of performing any important function as an ingredient. Unquestionably plaintiff would have openly and frankly discontinued the use of coca altogether, and made no bones about it, just as did all the other manufacturers of similar products, but for the fact that, as explained by Asa G. Candler:

"We have a *trade-mark*, and the Government won't let us trade anything that has the least touch of humbug about it. *** The Government won't give us a *trade-mark* unless we put '*coca*' and '*cola*' in it." (*Rucker Rec.*, 259)

Section 8 of the Food & Drugs Act provides:

"The term 'misbrand,' as used herein, shall apply

to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular."

Section 21 of the Trade-Mark Act of Feb. 20th., 1905, as amended (33 Stat. L. 729; 10 Fed. Stat. Ann., 415) provides:

"That no action or suit shall be commenced under the provisions of this Act in any case where the trade-mark is used in unlawful business, or upon an article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise," etc.

Plaintiff well understood that "Coca-Cola" was a descriptive term purporting to describe a compound or mixture of coca and cola, and that, unless its product were in fact a compound or mixture of coca and cola, the use of that term, and of the pictures of coca leaves and cola nuts on its labels, would constitute a statement, design, and device regarding such article, and the ingredients or substances contained therein, which were false and misleading; and, hence, that its product would be misbranded, and its alleged trade-mark deceptive and invalid.

In this dilemma plaintiff resorted to the subterfuge above mentioned. It determined to exhaust the coca leaf of all of its cocaine and associated alkaloids, and, from the exhausted pulp that remained, to make a weak

alcoholic "extract" of whatever minute traces of inert substances chanced to remain in the leaf after its valuable constituents had been removed, and to put just a suspicion of this so-called "decocainized coca extract" into its preparation, not for the purpose of affecting its medicinal character, or its flavor, but merely to lend a weak support to the statement that the article sold was "Coca-Cola." It was thought that this awkward sham would enable plaintiff to advertise and sell, as and for "Coca-Cola," what was not "Coca-Cola," and to continue to use as its alleged trade-mark, without incurring the risk of misbranding its product, a term which may have partially described what that product was in the past, perhaps, but what it certainly ceased to be the instant plaintiff eliminated from it the "tonic and nerve stimulant properties" of "the wonderful cola plant." Instead of making this decocainized extract itself, plaintiff employed Dr. Schaeffer's concern, the Schaeffer Alkaloid Works, of Maywood, N. J., to manufacture the stuff for it. The reason for this was, according to Asa G. Candler:

"Because, with his facilities and the apparatus he had, he could manufacture it for me cheaper than I could." (Rec., 420).

The Schaeffer Alkaloid Works was, and is, perhaps the largest manufacturer of cocaine in the world (Rec., 446). It purchases large quantities of coca leaves for the cocaine which they contain, and in its process of manufacturing cocaine, extracts from them everything of value. Naturally it always has on hand a bountiful supply of the exhausted pulp of the leaves from which

the valuable constituents have been removed. This pulp contains nothing of any value, and, until plaintiff provided an opportunity to dispose of it for a small profit, was carted away and destroyed.

DR. JOHN A. WESENER (plaintiff's chemist):

"I don't know of any other use to which the exhausted coca leaves *** have even been put to by anybody, except to be put into this 'Merchandise No. 5.' So far as I know they have never been put to any other use. (Rec., 927). *** I have seen what is known as 'Merchandise No. 5' manufactured at Maywood, N. J., by the Schaeffer Alkaloid Works. (Rec., 923). You ask me if they extract the cocaine from the coca leaves, in the process of making cocaine, in substantially the same way as they do in making this 'Merchandise No. 5'; well, they use a similar solvent in removing the cocaine from the Erythroxyton coca. Yes, they take the cocaine out in the same way. It is one of the processes of removing cocaine from the coca leaves." (Rec., 927.)

CHARLES HOWARD CANDLER:

"Presumably Dr. Schaeffer takes the cocaine that he extracts from the coca leaves in this process of manufacturing 'Merchandise No. 5,' and sells it on the market as cocaine." (Rec., 448)

It costs very little to pass a twenty per cent. solution of alcohol through this waste material, and the Schaeffer Alkaloid Works could well afford to do this and sell the "extract" thus obtained to plaintiff at a very nominal figure. On the other hand, if plaintiff had en-

deavored to make this "Merchandise No. 5" itself, it would have had to purchase the unexhausted coca leaves as they come into the market, with all their valuable constituents in them, paying therefor the high price which the cocaine in them causes them to bring, and then extract the cocaine and associated alkaloids from them, before it could have obtained the exhausted pulp from which to make its "extract" of exhausted coca pulp, or "Merchandise No. 5." The undertaking would have been impracticable, and the cost prohibitive,—unless, perhaps, plaintiff had gone into the cocaine business on the side and sold the cocaine which it thus extracted from the coca leaves as a "by-product."

THE DECOCAINIXING PROCESS.

The process to which the Schaeffer Alkaloid Works subjects the coca leaves in extracting the cocaine from them for commercial use, and which, therefore, constitutes the first step in the preparation of the leaves for the manufacture of plaintiff's "Merchandise No. 5," (Rec., 448); 927) is thus described by Dr. Charles E. Caspari, of St. Louis (plaintiff's witness):

"The coca leaf is first powdered very finely, and then mixed with about an equal bulk of sawdust, and to that is added a sufficient quantity of a dilute solution of sodium bicarbonate for the purpose of rendering the leaf alkaline in order to free the alkaloids. Then it is packed in a percolator and is exhausted with toluene. After this exhaustion is complete, and all the alkaloid is removed,—it being understood that the toluene, as it percolates through the leaf, drips and is collected,—live steam is blown

up through the leaf, which has been exhausted of the alkaloids, to remove every trace of the solvent toluene. *** That is the decocainizing process. *** The toluene I speak of is what is known as a hydrocarbon. *** Toluene comes from coal tar. The object of putting saw dust with the coca leaf is to make the extraction more easy. A large majority of drugs are mixed with some inert material. When they are extracted for the purpose of obtaining the active principle, whatever it may be, in order to make the percolation easier, sawdust may be used, or exhausted bark or root,—what is commonly called marc,—and some other drug as a dilutent; sand is sometimes used, to keep the mass from packing too closely. It is a mechanical reason, not a chemical one. This makes the percolation easier by separating the small particles of the leaf into which the leaf has been ground or powdered and keeping them from packing in that way. (Rec., 905, 907). *** The coca leaf is treated with bicarbonate of soda in a very dilute solution, the object being to free the alkaloid in the leaves so that it can be dissolved and taken out by the solvent. That alkali, the bicarbonate of soda, still remains in the drug after it has been treated with the solvent. Then this drug is soaked for several days in a volume of six or eight times its volume,—I cannot answer that accurately because I do not know positively,—of the solvent of toluol;¹⁹ the toluol was probably eight times the volume or weight of the amount of drug used. This drug is treated for the extraction of the alkaloid by the process of masceration and percolation. Of course, the toluol that first comes

¹⁹**Toluol** and **toluene** are the same thing; one is the English name for it, and the other is the German term. Throughout the record these terms are used interchangeably and synonymously.

off is much richer, and the last of it contains practically no alkaloid at all. *** Steam at 60 pounds pressure would be 257 degrees Fahrenheit. I cannot say accurately as to the time required by this process of distillation to remove all the toluene from the drug,—I should say a couple to several hours, which might mean from two to five, depending upon the quantity of the compound to be made up at that time, chiefly, and whether the steam was exactly at 60 pounds pressure, or a little less or a little more.” (Rec., 918, 920.)

Dr. Caspari explains that the prime object of this harsh treatment of the leaf is to remove every trace of the cocaine and allied alkaloids. They must be removed at all hazards, so that not a trace remains, no matter whether anything else is left in the leaf after they have been extracted or not:

“No, I won’t admit that this process for decocainizing coca is a rugged, harsh process to which to subject a drug expecting to obtain from that drug any of its natural properties after having been so treated, because the prime object of this treatment in the first place is to remove the cocaine and the alkaloids. They must be taken out absolutely so that not a trace is left. That requires the treatment I have explained. That is the prime object of the process.” (Rec., 921.)

A pretty fair idea of what this rough treatment does to the coca leaf may be gained from a consideration of what it will do to tea leaves, which are closely analogous. Dr. Caspari says:

“No, if you were to take a sample of tea, treat

it with an alkali as explained, soak it for several hours in toluene, drive off the toluene by several hours of distillation with a high pressure of steam of two hundred and fifty-seven degrees Fahrenheit, in which a very large amount of water is obtained in distillate, I do not think that the tea so treated could be made into a presentable article for drinking; because we drink tea primarily for the caffeine which it contains, and that would be removed in this process which you describe. But not only would the caffeine be removed, but its taste would be entirely modified." (Rec., 921, 922.)

BALANCE OF PROCESS OF MAKING "MERCHANDISE No. 5."

After the cocaine and associated alkaloids have all been thus extracted from the coca leaves for commercial use, and everything of a volatile nature driven off by sixty pounds pressure of live steam at a temperature of 257 degrees Fahrenheit for from two to five hours duration, then the exhausted pulp thus remaining, which was formerly carted away and destroyed as worthless refuse, is submitted to the following treatment to complete the manufacture of "Merchandise No. 5."

DR. CHARLES CASPARI:

"Now, after having extracted the alkaloid and having steamed the coca leaf, the balance of the process of making 'Merchandise No. 5' is as follows: The coca leaf is then mixed,—understand, now, that we have 380 pounds of it to start with,—with 125 pounds of cola nuts, and they are exhausted with an alcohol of about 18 to 20 per cent. in strength. This is then racked off and pasteurized, and is then the finished product. That makes 900

gallons of the finished product,—the 380 pounds of coca leaf and 125 pounds of cola nut, when treated in this manner, make 900 gallons of 'Merchandise No. 5.' In making these percolations, about 900 gallons of 18 to 20 per cent. alcohol are used." (Rec., 911.)

**THE FUNCTION ATTRIBUTED TO "MERCHANDISE No. 5."—
a flavoring agent.**

Plaintiff attempts to justify its fraud in palming off as "Coca-Cola" a preparation containing nothing more from either the coca leaf or the cola nut than is supplied by this "Merchandise No. 5," by pretending that the minute traces of inert substances thus obtained from the coca leaf and the cola nut impart a *taste* and *flavor* that are essential to its product,—the theory evidently being that, if it can be shown that these infinitesimal particles of tasteless and odorless substances perform some function in the preparation other than lending a weak support to the statement that the article sold is "Coca-Cola," then plaintiff is justified in continuing to palm off its preparation as and for a preparation of coca and cola.

Thus, Dr. Charles E. Caspari states that the function which "Merchandise No. 5" performs in plaintiff's product is to impart to it its odor and flavor. He says:

"It undoubtedly gives an odor and flavor to 'Coca-Cola.' " (Rec., 903.)

He says that the object in extracting the exhausted leaves with twenty per cent. alcohol, after they have been put through the "de-cocainizing" process, is to en-

deavor to obtain from them any odoriferous or flavoring principles that may have chanced to remain in them:

“Now, then, after the cocaine has been removed, and the residue is harmless so far as its physiological effect is concerned, then an effort is made to remove from it the remaining odoriferous and flavoring principles that may be there, and that is done by extraction with twenty per cent. alcohol.” (Rec., 921.)

In other words, after all the “tonic and nerve stimulant properties” of the coca leaf are removed, and it is no longer capable of producing any therapeutic effect whatever, then an effort is made to extract such flavoring properties as may be left, if any.

DR. JOHN A. WESENER:

“From a strictly chemical and medicinal standpoint, the characteristic property of the coca leaf is removed in making this ‘Merchandise No. 5,’ but not from a food standpoint or flavor standpoint. (Rec., 928) *** It is the residue that contains various principles which are very essential to the manufacture of Coca-Cola Syrup.” (Rec., 926.)

This position was also taken by the Coca-Cola Company in the case of the *U. S. v. 40 Barrels and 20 Kegs “Coca-Cola,”* 241 U. S., 265; 60 L. Ed., 995. In that case Mr. Justice Hughes, who delivered the opinion, in stating the plaintiff’s insistence said (241 U. S., 272; 60 L. Ed., 999):

“It is further stated that, in manufacturing in accordance with the formula, certain extracts from the leaves of the coca shrub and the nut kernels of

the cola tree were used for the purpose of obtaining a *flavor*,' and that 'the ingredient containing these extracts,' with cocaine eliminated, is designated as 'Merchandise No. 5.' "

This lame effort to justify so palpable a fraud is pure "camouflage."

**FUNCTION ATTRIBUTED TO COCA AND COLA ORIGINALLY.—
NEVER CONSIDERED FLAVORING AGENTS.**

In the first place, the idea of using the drugs coca and cola for flavoring purposes, or of attributing to them any value as flavoring agents, was never for a moment entertained by plaintiff until the necessity for pretending that its product is still a compound or mixture of coca and cola, despite the fact that it is now totally devoid of every trace of the characteristic properties of coca,—its "tonic and nerve stimulant properties."—and despite the fact that its caffeine effect is produced by ordinary commercial caffeine obtained from "tea dust" or the "sweepings" of the tea trade, and not from the cola nut,—compelled plaintiff to attribute some important function to the minute traces of indefinable extractives from the coca which are present in "Merchandise No. 5."

The fluid extracts of both coca and cola were looked upon strictly as medicines, and were used solely as medicinal agents for their "tonic and nerve stimulant properties," and to produce the wonderful stimulating and exhilarating effect to which was due the chief claim to merit of plaintiff's product. Thus, F. M. Robinson, in 1902, in his testimony in the *Rucker* case, said:

“Q.—If you eliminate cocaine and caffeine from the coca leaves, tell the jury what possible effect it could have? *** *Mr. Arnold* [for Coca-Cola Company]: If you eliminate those, it is not ‘Coca-Cola.’ *** Q.—Eliminate those two things, coca nut and coca leaves, what is there in ‘Coca-Cola’ that would relieve exhaustion or cure headache? A.—*Those are the things that do it.* Q.—Weren’t they put in it for that purpose? A.—*Yes, sir.*” (*Rucker Rec.*, 302.)

ASA G. CANDLER said, in the same case:

“Q.—If this is purely and simply a refreshing soda fountain beverage, state why you put this preparation known as the tincture that you make, of coca leaves and cola nuts in ‘Coca-Cola’? *** A.—To make it popular. *** Q.—Do you tell the jury that the stuff you put in there is *simply a mental stimulant*? A.—*Yes, sir.* Q.—*That all?* A.—*That is about as far as it goes.*” (*Rucker Rec.*, 267-8).

and again:

“Q.—Isn’t it true of this preparation, that you advertise the merit of ‘Coca-Cola’ as deserving of special merit, as being delicious and refreshing, on account of the fact that you put in it these celebrated cola nuts? A.—Not *delicious* and *refreshing* on account of the cola nut. (*Rucker Rec.*, 431) *** We use it for its caffeine effect.” (*Rucker Rec.*, 262).

and again:

“Q.—Mr. Candler, are cola nuts drugs? A.—Yes, sir. Q.—And a *medicine*? A.—Yes, sir. Q.—And used *that way*? A.—Yes, sir,—*by us.*” (*Rucker Rec.*, 432.)

DR. JOSEPH JACOBS, in the same case:

“Q.—Caffeine is a medicine? A.—Said to be.
Q.—Cocaine is a medicine? A.—Yes, sir. *** Q.—A preparation that has in it the combined ingredients of cocaine and caffeine, wouldn’t you regard it, not as a medicine merely, but as a medicinal compound? *** A.—In minute proportions, I don’t regard it as a medicinal compound. Q.—What part would these things play in it? A.—Simply have an *exhilarating effect* in the beverage.” (*Rucker Rec.*, 319).

SAMUEL C. DOBBS, in the same case:

“Q.—Do you know what caffeine is used for? A.—Yes, sir. Q.—What? A.—It is a *cerebral stimulant*.” (*Rucker Rec.*, 396).

DR. J. J. KESSLER, in the case at bar:

“This fluid extract of coca you are talking about is used as a *medicine*, and the fluid extract of cola the same way.” (*Rec.*, 2497).

DR. JOHN A. WESENER, in the case at bar:

“Parke-Davis & Co. make up one product which is known as fluid extract of coca, and another product known as fluid extract of cola. *** They are *medicinal products*.” (*Rec.*, 391).

In *Nashville Syrup Co. v. Coca-Cola Company*, 215 Fed., 528 (“C. C. A.”-6), it was said:

“Coca is a South American shrub from the leaves of which cocaine, among other substances, is obtained. The cola tree grows in Africa, and from its nuts caffeine may be extracted. *** Before 1887 extracts, reselectively, from coca leaves and cola

nuts had found a place in the Pharmacopoeia. ***
 'The extracts were used *only by druggists* in compounding *medicine*.'

In stating the ingredients of plaintiff's product, not one of plaintiff's witnesses for a moment thought of classifying either coca or cola among the flavoring agents. For instance:

ASA G. CANDLER:

"Q.—Describe how it is made,—the ingredients of it? A.—We take what is known as coca leaves and cola nuts. Those are the two leading ingredients. We call it 'Coca-Cola.' *** Those two articles are ground up and made by percolation. *** We put them in a large percolator, mix it, and it is made into a compound tincture. *** We also take several *flavoring articles*, including lemon and vanilla, and they are put in the proper caldron and made into what we call 'Coca-Cola.' *** Q.—What is the purpose of the aromatics you put in it? A.—To make it pleasant, attractive, etc. *** Q.—*What aromatics do you use to give flavor?* A.—*Lemon, vanilla and that class of aromatic flavor.*"

and again:

"You see, we don't apply any heat to cola nuts or [coca] leaves. After the syrup is made, *with the flavoring*, [then] we put this solution, or whatever you may call it, [of coca and cola] into a tank with absolutely cold syrup." (*Rucker Rec.*, 263).

and again:

"*We flavor it with lemon, vanilla and calcium*

[cassia]. Q.—What *else*? A.—*Nothing else.* (*Rucker Rec.*, 267).

“Q.—Were you not asked this question, Mr. Candler :

‘Q.—I would like for you to state, not only the leading, but the smaller,—state the large ones and the small ones?’ and didn’t you state: ‘We flavor it with lemon, vanilla and calcium. Q.—What else? A.—Nothing else.’

“A.—*Yes, we flavor it with nothing else but what I stated.*” (*Rucker Rec.*, 427).

and again :

“Q.—This question was asked you: ***

‘Q.—What else? A.—We flavor it with lemon, vanilla and calcium. Q.—What else? A.—Nothing else.’

“A.—*As to flavoring, of course **** There is something there, my friend, that makes me say something foolish, if you want to fix it. It is there ‘calcium.’ That is lime. It should be ‘cassia,’ which is cinnamon, and that is what I said.” (*Rucker Rec.*, 433-4).

SAMUEL C. DOBBS:

“Q.—Isn’t it true that ‘Coca-Cola’ was composed of sugar, water, alcohol, coca leaves, cola nuts, *with lemon, vanilla and calcium flavorings*, and *nothing else*? A.—*Yes, sir.*” (*Rucker Rec.*, 395).

Neither did Benjamin Kent regard the extract of coca and caffeine, of which his “Coca-Cola” was composed, as flavoring agents:

“It contains the extracts of coca and caffeine, which is the active principle of cola nuts; also, tinc-

ture of bitter orange peel, *and some little flavoring*; that is all, and some spirits to keep it." (*Defendants Exhibit 68*, p. 16).

In fact, Charles Howard Candler shows that the flavoring ingredients of plaintiff's present product are put into the syrup as a separate group apart from the "Merchandise No. 5":

"One [ingredient] consists of *flavoring oils* dissolved in alcohol,—they are *concentrated oils*, and have *a strong flavor*. In addition to that, we put glycerine into the syrup and a product which we call 'Merchandise No. 5,' " (Rec., 442.)

IT WOULD BE A FRAUD TO SELL, AS "COCA-COLA," A PREPARATION PRACTICALLY DEVOID OF COLA AND DEVOID OF THE CHARACTERISTIC PROPERTIES OF COCA, EVEN THOUGH A FLAVOR COULD BE OBTAINED FROM COCA LEAVES AND COLA NUTS.

In the second place, even supposing the drugs coca and cola to contain valuable flavoring properties, and supposing such flavoring properties to be present in plaintiff's product and to impart to it its flavor, it would nevertheless be a rank fraud to advertise and sell, as a preparation of coca and cola, an article that was devoid of every trace of the characteristic properties of coca,—its "tonic and nerve stimulant properties,"—and that contained nothing appreciable from the cola nut; and particularly would this be true in the case of a product that had been widely advertised as possessing special merit on account of the presence in it of the "tonic and nerve stimulant properties" of the "wonderful coca plant and the famous cola nut," as plaintiff's product was advertised, and the reputation and demand for

which had been built up on the strength of that representation.

The U. S. Pharmacopoeia, in conjunction with the Pharmacopoeias of Great Britain, Germany and Switzerland, has standardized the alkaloidal strength of coca and of fluid extract of coca, and prescribed the quantity of alkaloid each must contain to be officially recognized as such.²⁰ Coca is required to contain not less than 0.5 per cent. of the "ether soluble alkaloids of coca,"²⁰—that is, of cocaine and its derivatives,—and the fluid extract of coca is required to contain 0.5 of a gramme of the "ether soluble alkaloids of coca" to each 100 cubic centimetres of the liquid.²⁰ If either fail to contain the requisite amount of "cocaines" thus prescribed, it is not coca, or fluid extract of coca, and is not entitled to be described as such.

DR. J. J. KESSLER:

"The Pharmacopoeia standard is one half of a per cent. *** The Pharmacopoeia accepts a standard of one-half per cent. on coca leaves. They must have that in them to be official." (Rec., 2499-2500)

"Coca" means a drug containing not less than 0.5 per cent. of cocaine and its derivatives. "Fluid extract of coca" means a fluid extract containing 0.5 of a gramme of cocaine and associated alkaloids to each 100 cubic centimetres of the liquid. Therefore, to advertise and sell, as "*Coca-Cola*," a preparation which formerly contained the "tonic and nerve stimulant properties" of coca, and which was advertised throughout the length

²⁰See Foot Note 12, ante.

and breadth of the land as possessing special merit on that account, but which is now totally devoid of every trace of those properties, would be to mislead and deceive the public as to the nature of the preparation, and as to the properties the public would be justified in expecting it to contain.

Section 7 of the Food & Drugs Act provides:

“That for the purposes of this Act an article shall be deemed to be adulterated: in a case of drugs: First.—If, when a drug is sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality, or purity as determined by the tests laid down in the United States Pharmacopoeia or National Formulary, official at the time of investigation.”

No matter how valuable as a flavoring agent the “remaining extractive” of opium²¹ might be, the public would certainly be deceived and defrauded by the advertisement and sale, as “Opium Nux Vomica,” of a preparation from which the characteristic properties of opium,—morphine and its associated alkaloids, codeine, heroin, etc.,—were absent.

DR. WILLIAM M. SIMONSON (defendant's witness):

“If all the alkaloids and all the essential oils were extracted from the coca leaf, I would not consider

²¹“Among the properties usually found in plants, the following have been observed in opium: an odorous property soluble in ether, benzine, and petroleum-benzin; glucose; gum, pectin; and a compound resembling caoutchouc; wax; fat; a small amount of resin; coloring matter and that indefinite substance usually designated as ‘extractive.’” p. 1125.—**NATIONAL STANDARD DISPENSATORY.**

it longer as coca. If all the morphine were extracted from opium, what was left would not be opium. If all the strychnine was extracted from nux vomica, what was left would not be nux vomica." (Rec., 2511).

JOHN W. ROSSITER, (plaintiff's witness):

"The alkaloid cocaine is the active principle of the coca leaves. Take that and the [other] alkaloids out of the coca leaves, and there is not much of the coca leaf left. *** You have taken the spirit out of the body." (Rec., 936.)

DR. JOSEPH JACOBS, (plaintiff's witness):

"Besides cocaine, coca leaves have in them extractive matter,—cocaine is the only thing of any importance." (Rec., 410).

COCA AND COLA ARE NOT IN FACT FLAVORING AGENTS

In the third place, neither the coca leaf nor the cola nut has any properties that make it valuable as a flavoring agent.

DR. J. J. KESSLER, (defendant's witness):

"The coca leaf *** contains not much of any flavoring substance. It has not much odor or flavor." (Rec., 2467).

DR. H. C. FULLER, (plaintiff's witness):

"The aroma of coca leaf does not mean very much. Of course, all leaves have an odor which you might call aroma. *** I could not detect coca leaves by odor alone; that would be impossible. No, I could not detect coca leaves by odor alone. You ask if coca leaf has a characteristic odor; it has an

odor that is characteristic of leaves, but other leaves have very similar odors, so that I would not want to take a bag of leaves and smell it and say it was coca leaves." (Rec., 2361-2).

And again, when asked what other leaves smell similar to coca leaves, he replied:

"Oh, I don't know,—lots of leaves of different kinds." (Rec., 2362).

DR. J. J. KESSLER:

"The cola nut has practically no flavoring qualities whatever. Cola nut is a hard, woody nut. When you chew the nut it tastes like so much hardwood sawdust. It tastes a little bitter, but has no more flavoring in it any more than hardwood sawdust has a flavor,—perhaps not as much." (Rec., 2468).

ASA G. CANDLER:

"They are the hardest kind of nut." (*Rucker Rec.*, 432).

It will be readily seen from their constituents that coca leaves and the cola nuts have no value for flavoring purposes.

DR. CHARLES E. CASPARI:

"Coca leaves contain, in addition to the cocaine and allied alkaloids, a fat, a volatile oil, a resin, a wax, chlorophyll, tannin, cellulose, a substance known as hygrine, and minute traces of calcium oxilate. The cola nut consists of caffeine, kolanin, tannin, strach, gum, resin, protein matter, cellulose, and wax and theobromine." (Rec., 905).

DR. H. C. FULLER:

“Hygrine occurs in the leaf when it is freshly gathered, but that disappears before it reaches the market.” (Rec., 2339).

DR. J. J. KESSLER:

“Cellulose is the fibre of the leaf.” (Rec., 2495).

DR. CHARLES E. CASPARI:

“Cellulose has neither taste nor smell, nor has it any stimulating qualities.” (Rec., 909).

DR. C. A. MESERVE:

“The most important characteristic of the coca leaf, apart from the ordinary constituents that you find in any plant life, is cocaine. That is the alkaloid. It contains, besides that, some minerals. It contains chlorophyll, starch, cellulose, traces of sugar, some mineral matter. All leaves have a certain per cent.,—extremely slight,—of a waxy or resinous material. There are a number of things in minute quantities that you find in any plant life. It contains a number of things. I am not prepared to say it contains any fat. Probably. Practically all leafy matter has minute traces of fats, oils, or waxes. I assume it contains coca tannin. Tannin is a normal ingredient of plants.” (Rec., 2465).

DR. J. J. KESLER:

“The coca leaf, besides the cocaine which it normally contains to the extent of about one-half per cent., contains small amounts of an essential oil, a fatty substance, a wax, chlorophyll, [and] extractive matter which hasn’t any individuality at all,—it simply comes out when you boil the leaves with

water,—it is a starchy substance, or gummy substance.” (Rec., 2467).

Dr. Caspari shows that the substances of which the coca leaf is composed, aside from the alkaloids, are present in such infinitesimal quantities that it is practically impossible to determine the quantity:

“I can not tell you the quantities in which these substances, aside from the alkaloids, are present in the coca leaf, because I don’t know. I have never made any quantitative analysis of them, and I do not think it has ever been done by anybody.” (Rec., 908).

SUCH OF THE PROPERTIES OF THE COCA LEAF AS COULD BE ABLE TO IMPART THE SLIGHTEST FLAVOR DO NOT ENTER INTO “MERCHANDISE No. 5.”

In the fourth place, such of the properties of the coca leaf as might tend, in a measure, to impart some slight odor or flavor to a solution in which they were present, do not enter into the composition of “Merchandise No. 5,” and, therefore are not contained in plaintiff’s product. According to plaintiff’s own showing, the twenty per cent. alcohol with which the “decocainized” coca leaves are finally extracted to obtain “Merchandise No. 5” would not extract, even from the unexhausted leaves in their natural state and before being subjected to the harsh treatment they receive in the “decocainizing” process, any properties that could impart the slightest odor or flavor; much less would it extract any such properties from the spent, exhausted pulp that remains after “decocainization.” Dr. H. C. Fuller, plaintiff’s own chemist, and its chief one, sets out fully everything the twenty per cent. alcohol would extract:

"If you used twenty per cent. alcohol, and the coca leaves were the ordinary *Erythroxylon coca*, you would get from the coca leaves cocaine and the light alkaloids, tannin, and probably a little chlorophyll, and any mineral matter that was present soluble in the alcohol mixture, and probably a little protein matter." (Rec., 2356).

That these properties, with the possible exception of the tannin, could not impart the slightest flavor or aroma, is frankly admitted.

DR. CHARLES E. CASPARI:

"Cocaine does not in the least add anything to the flavor of a product." (Rec., 905).

DR. H. C. FULLER:

"You ask if cocaine has any taste; *** it would not impart a flavor to anything to which it had been added. *** None of the other alkaloids in the coca leaf has any flavor." (Rec., 2357).

DR. J. J. KESSLER:

"Chlorophyll is the chemical substance which gives the green color to all green-colored plants." (Rec., 2469).

DR. H. C. FULLER:

"I don't know of any flavor that chlorophyll has; it is not a flavoring agent." (Rec., 2357).

DR. CHARLES E. CASPARI:

This chlorophyll is a substance that is common to all green vegetation. *** I do not suppose chlorophyll has any physiological properties. *** It

is an inert substance, no question about that." (Rec., 908-9).

DR. H. C. FULLER:

"You ask what is the mineral matter that I speak of that comes out of the coca leaf; well, any vegetable substance contains small quantities of inorganic salts, mineral matter,—some contain [ing] calcium oxilate,—that is quite a common constituent, a material, in plant material,—and phosphate. You ask what different varieties of phosphate; I speak of a phosphate present, probably alkaline as alkaline earth phosphates, and there is usually a little passive nitrate even in plants. I don't say these things all occur in those cases, but they are present in some plants; and then that mineral matter might be. I don't know specifically what mineral matter would come out. *** You ask what is the protein matter that I speak of; all vegetable materials contain-[ing] nitrogenous substances which are known chemically as proteins. *** Neither the flavor nor aroma of fluid extract of coca would be changed or modified by the absence of that protein or mineral matter from the fluid extract of coca. The only thing obtained from the coca leaf and which is present in this extract that we have been speaking of,—extracted in the manner heretofore outlined,—that really has got a flavor, or that really tends to flavor anything in which it is put, would be the tannin. (Rec., 2358-9) *** Q.—Is tanning a flavoring agent? A.—No, sir, it is not." (Rec., 2390).

But even if twenty per cent. alcohol could extract

from the coca leaves, before they are "decocainized," any of the slight flavoring qualities they may possess, nevertheless it is certain that it could not do so after the leaves are "decocainized," for the very good reason that all such properties are completely removed from the leaves, along with the alkaloids, in the "decocainizing" process, and are not present in the leaves when they are extracted with twenty per cent. alcohol to obtain "Merchandise No. 5."

DR. H. C. FULLER:

"Q.—Would, or not, any of the flavoring matter be removed from the coca leaf in the process of extracting it by means on toluol,—and, if so, how and why?—before it enters into 'Merchandise No. 5'? A.—Yes, sir, they would all be removed. Q.—Now, in what process? A.—By the toluol and by the subsequent steaming process. Q.—How does the steam serve to remove the flavoring matter and odors? A.—They are removed because they are volatile. That is the process used to remove the flavoring agents from a great many flowers, leaves, and things. Q.—Why would this toluol remove any of them? A.—Because they are very soluble in oily mixtures of that kind." (Rec., 2384-5).

The only constituents of the coca leaf that could impart an odor or taste, are the essential oils,—and perhaps, the tannin, and the trace of wax that is present.

DR. J. J. KESSLER:

"The thing which gives it the odor is the essential oils in it. *** (Rec., 2467) *** The essential things as far as flavor is concerned are the essential oils.

(Rec., 2474). *** If the essential oils are extracted from the coca leaf by some chemical process, then they are spent as far as taste is concerned. *** There only remains the taste of *such* [so much] vegetable matter, which you get by boiling very nearly anything up,—any kind of leaves up, with water. The aroma and boquet of the leaves, under those circumstances, is removed; it is gone.” (Rec., 2468).

DR. CHARLES E. CASPARI attributes some slight flavoring properties to the tannin and the wax, also:

“No, all of the ingredients left in the leaf do not have a taste. *** It is only just some of those ingredients that give the leaf its taste. *** The wax imparts the taste of coca wax. *** I should say this wax also imparts an aroma, because all waxes do. The other things which give taste and aroma are the tannin and the oils.” (Rec., 910).

Dr. Caspari has never made any actual tests to determine whether or not the essential oils are removed during the toluene extraction and the steaming process, and, therefore, is not in a position to give any definite information upon the subject; but he is of the opinion that some of the essential oils might be extracted by the toluene solvent, and that others would unquestionably be volatilized and driven off by the steam, along with some of the resin. Thus:

“No, the oils which I refer to as remaining in the coca leaf would not necessarily be extracted by the toluene in the percolation process. That is *paramount* [tantamount] to saying that all oils would be soluble. Some oils undoubtedly would be, and

some would not. 'The oils in the coca leaf, I believe, would not be,—at least, not entirely so. Some of them might be extracted, but I cannot say that they are. I have never made a determination to prove that they are not. (Rec., 912). *** No, it is not true that if a substance were treated by a current of hot steam at a temperature of 257 degrees Fahrenheit for from two to five hours, that all of the substance which is volatile would be carried away in every drug that could be so treated. I know of an instance where that would not be true. 'That is the distillation of ajowain seed for thymol. *** That might be considered an exception to the general rule. (Rec., 920). *** Some of the oil would be volatile. Some of the oil in the coca leaf is an essential oil, and by essential oil I mean one that can be volatilized without decomposition. Some of that would go off, and perhaps the least bit of resin. 'That is all I think could be volatilized. (Rec., 907). *** 'The only way to decide that will be to actually make a test of whether there is anything volatile left in there after that experiment has been made.' (Rec., 920).

Dr. Caspari has made no such test.

DR. JOHN A. WESENER is of the opinion that toluene might remove some of the oils, and probably some of the wax:

"Besides cocaine, toluene takes out the other alkaloids, too. I don't believe it takes out many other properties. It may take out some of the oils,—probably some traces of wax that are soluble in toluene. I imagine that coca wax might be slightly soluble in toluene." (Rec., 932).

DR. H. C. FULLER states without reserve that "toluene extracts the wax from the leaf" (Rec., 2369), and he proves it, later, in his process of extracting the caffeine from plaintiff's product with chloroform to determine the percentage of caffeine which it contains. Thus, he says:

"The chloroform does not extract anything from the syrup besides caffeine in the case of genuine 'Coca-Cola' syrup, but, in the case of any of these other products I have analyzed, it sometimes does. It is apparent that in some instances it drowns out certain things from the flavor,—that has happened in some instances—certain resinous constituents, waxy substances of unknown determination. (Rec., 2276). *** I said the kind of substance that sometimes comes out with chloroform is resinous and waxy substance. *** It is, for instance, a substance like beeswax. (Rec., 2277). *** It is an inert material which does not dissolve in water. (Rec., 2279). *** I want to state emphatically now that these waxy and gummy substances spoken of were not in 'Coca-Cola.' " (Rec., 2313).

DR. WILLIAM M. SIMONSON:

"Toluene would extract from the coca leaf any fatty material, wax, chlorophyll, any essential or volatile oil. That is about all for the natural leaf. *** Toluene would not extract the alkaloids in their natural state of combination. It would extract the free alkaloids, alkaloids set free by a base, such as [bi-] carbonate of soda, for example. I have read the testimony of Dr. Caspari in this case as to the method whereby 'Merchandise No. 5' is made for the 'Coca-Cola' syrup. By the process which he uses, toluene would take out of the coca

leaf the organic bases so far as they are in a free state, any waxy material,—probably take out all of it,—take out any fixed volatile oil, or [and] it would likewise dissolve no small part of the resinous material present, and likewise of the chlorophyll. The flavoring properties are due, if I understand, to volatile material, and practically they would be dissolved entirely by the toluene.” (Rec., 2502-3).

Neither Dr. Caspari nor Dr. Wesener has made any actual test to ascertain just what is, in fact, removed by toluene and the steaming process, or what finally goes into “Merchandise No. 5.” The opinions they give are largely speculative. Dr. Wesener frankly admits that he is not sufficiently informed to intelligently discuss the subject:

“I do not know that toluene is the best solvent for taking out everything from the coca leaves. There may be other solvents that will take out more products than toluene, whereas toluene may simply confine itself largely to the extraction of cocaine, and do it thoroughly. That is something, as I say, I cannot go into, because I have not looked up that particular phase of the subject. *** I would have to look that up and investigate that further.” (Rec., 932).

But Dr. J. J. Kessler did make a very thorough and painstaking test, and determined with scientific precision and accuracy just exactly what the toluene does remove, and just exactly what does eventually enter into “Merchandise No. 5.” Thus:

“I have read the testimony of Dr. Caspari in this case as to the method by which this ingredient

[that] goes into 'Coca-Cola' syrup, known as 'Merchandise No. 5' [is prepared]. I prepared 'Merchandise No. 5' according to the method described by Dr. Caspari. *** I analyzed the toluene extract. *** It is not true that toluene extracts from the coca leaf only the cocaine and associated alkaloids. My tests show that toluene extracts six times as much other material as it extracts cocaine. *** The toluene extracted from the coca leaf, by this method, all the oils, fats, waxes and resinous substances found in the leaves. It also extracted much, if not most, of the chlorophyll. It extracted most of the flavoring principles of the coca leaf. It extracted a large portion of the cocaine. I found 3-100 of a per cent. of cocaine in coca leaves which had been extracted by this process, by toluene, as against 60-100 of a per cent. which they contained normally. The color of the toluene extract I got from the coca leaves was a very dark green color, almost black. That color was due to the chlorophyll extracted from the leaves. Chlorophyll is a chemical substance which gives the green color to all green-colored plants. *** The toluene extract which I made contained .188 [4.88] per cent. of solid matter. This is six times the amount of cocaine present in the leaves ordinarily,—[that is] five of these parts are things which are not [cocaine]. These five parts consist entirely of what I call resinoids,—that is, they are waxy gums and oils which are not soluble in water but which are soluble in toluene. The toluene extract consists practically entirely of those two things,—that is, one part of cocaine, and five parts of resinoids. There is a small amount [of] remaining extractive, which amounts to a few per cent. outside of those two substances. That remain-

ing extractive,—well, it is hard to say what it is, except that it is extractive which is afterwards soluble in water. It might have small traces of starch, or it might be a number of different things. (Rec., 2469-70). *** I made an analysis of coca leaves,—that is, a formal analysis outside of this preparation of 'Merchandise No. 5,'—and found that the toluene extracts 4.9 per cent. of material. That is the figure from which I made my conclusion that toluene extracts six times as much other material from the coca leaves than the cocaine present. It should be more nearly eight times, but six times is the figure I gave." (Rec., 2472-3).

Then, to check the results thus obtained, and at the same time to determine just exactly what substances from the coca leaf enter into "Merchandise No. 5," Dr. Kessler made up a sample of "Merchandise No. 5" according to the process described by Dr. Caspari, but left out the cola nuts. In other words, he "decocainized" the coca leaves with toluene and steam, and then extracted the residue with twenty per cent. alcohol:

"I made an analysis of 'Merchandise No. 5' made up according to this process that I have mentioned from coca leaves and sawdust, but leaving out the cola nuts. The result was that it contains no gums, resins, fats, waxes or oils. It contains 1.9 per cent. tannin and 1.16 per cent. indefinable extractive matter, such as starchy substance, gummy substance, sugar, perhaps,—all material which is soluble in water. Practically half of tannin and half of indefinable extractive. (Rec., 2470-1). *** The purpose of using sawdust in the extraction of coca leaves with toluene is to separate the mass, so that

the extraction is more thorough. Something from the sawdust is extracted in that process. In the latter process, after the toluene process is finished, and you take up the extraction of the exhausted leaves with alcohol, the alcohol extracts from the sawdust, *** one sixth as much material as it extracts from the coca leaves. 'That material which is extracted from the sawdust is a small amount of tannin and some more indefinable extractive. (Rec., 2472). *** 'Merchandise No. 5' when made without cola nuts contains 2.25 per cent. of solid matter.'" (Rec., 2471).

Of this 2.25 per cent., therefore, five-sixths, or 1.875 per cent. is obtained from the coca leaves, and one-sixth, or 0.375 per cent. is obtained from the sawdust. Of the 1.875 per cent. of material thus obtained from the coca leaves, about half, or 0.937 per cent., is tannin, and the other half, or 0.937 per cent. is "indefinable extractive."

Dr. Kessler shows just what value is to be attached to this tannin and "extractive matter" as flavoring agents:

"In extracting the leaves with twenty per cent. alcohol, after the toluene extraction, the extract which you get from that 'contains' nothing but the tannin and the extractive matter, which contributes practically nothing to the taste, if not absolutely nothing.'" (Rec., 2473-4).

One would naturally suppose that if this tannin and extractive matter had any value for flavoring purposes, or for any other purpose, an effort would be made to obtain as much of it as possible from each batch of the leaves used. Instead, however, plaintiff actually tries to get as little of it as possible.

DR. J. J. KESSLER:

"The difference in extracting power of 95 per cent. alcohol and this dilute 20 per cent. solution of alcohol that is used in extracting and making 'Merchandise No. 5' is that 95 per cent. alcohol is a much more thorough extraction medium. It is practically pure alcohol. *** It would be very much greater, take up very much more material than the 20 per cent. If you wanted to get all the extractive in the leaves that you could get, you would use 95 per cent. alcohol. When you had used 95 per cent. alcohol, you would get more tannin and more indefinable extractive than you would get when you only used 20 per cent. alcohol. I made a determination on the spent residue after 'Merchandise No 5' had been made from them. I find that 95 per cent. alcohol still takes out 8.1 % of the material, and that after that boiling water still takes out 6.2% so that there is still left in the leaves 14.3% of the extractive matter originally present, or one-third of the total extractive matter originally present." (Rec., 2473).

Dr. Caspari analyzed the "Merchandise No. 5" actually used by plaintiff in its so-called "Coca-Cola" syrup, but he did not detect the presence of anything that could have been extracted from the coca leaf except chlorophyll and tannin, or anything that could have come from the cola nut except caffeine. Thus:

"I have made several determinations of 'Merchandise No. 5.' *** The last time I analyzed 'Merchandise No. 5' was just a few months before the trial above referred to at Chattanooga. [*U. S. v. Forty Barrels, etc., of 'Coca-Cola,' 191 Fed., 431; 215 Fed., 535; 421 U. S. 270, 60 L. Ed., 996*]. I stated that in my analysis I determined that there was

chlorophyll and tannin in 'Merchandise No. 5' but I did not determine the quantity. All I determined quantitatively was the alcohol and caffeine. I did not determine anything else qualitatively. I don't know whether, as a matter of fact, you can determine qualitatively anything else besides these four substances,—tannin, chlorophyll, alcohol and caffeine,—in 'Merchandise No. 5.' I have never tried to. I do not know whether the presence of the other substances could be detected or not. I have never tried it. I dare say, with enough material available and enough time at one's disposal, it could be done." (Rec., 913).

On a number of occasions, Dr. Fuller (plaintiff's chief chemist) analyzed "Merchandise No. 5" that had been prepared for plaintiff by the Schaeffer Alkaloid Works, and he was never able to detect in it anything whatever from the coca leaves except the tannin, and, on one occasion, what appeared to be a very slight trace of chlorophyll. Thus:

"Yes, sir, I have analyzed some samples of 'Merchandise No. 5',—that is, the 'Merchandise No. 5' that forms the ingredient of 'Coca-Cola' syrup. *** It was when the Government cases [*U. S. vs. 40 Bbbs. etc. of 'Coca-Cola,' 241 U. S. 270; 60 L. Ed., 996*] were being worked up, and samples were being obtained from the different factories. I have also tested 'Merchandise No. 5' since I left the Government. *** Since I left the Government I have tested it for the ingredients in it,—for the presence of extracts of coca and cola, and that is all. I don't know how many times I tested it while with the Government, but it was several times. (Rec., 2360-1). *** I tested it when with the Government

for chlorophyll. I did not find any chlorophyll in it. (Rec., 2361). *** You ask if I have ever been able in any of my analyses of 'Merchandise No 5' to determine the presence of any of the properties of the coca leaf except the tannin; yes, sir, I have found traces of chlorophyll,—some, that is, very slight traces. (Rec., 2362). *** I just observed it on a filter I was handling, and that was all,—a greenish characteristic appearance of chlorophyll. I went no further with it. (Rec., 2367). *** Aside from the chlorophyll, which is not at all characteristic of the coca leaf, and this tannin, I was never able to discover any other property of the coca leaf in 'Merchandise No. 5.' " (Rec., 2363). *** I performed several experiments with 'Merchandise No. 5' and tested it to see whether or not it had the characteristic flavor of extract of coca leaves. You ask if I detected any aroma characteristic of the coca leaf in 'Merchandise No. 5;' I don't know exactly what you mean. The aroma of coca leaf doesn't mean very much. *** You ask if I detected, so I would know it, the presence of any flavor in 'Merchandise No. 5' that was characteristic of the coca leaf, or of extract of coca; I don't think so. (Rec., 2361). *** 'There is no flavor or odor of coca leaf in 'Merchandise No. 5.' (Rec., 2390). *** Yes, sir, I did make a sample of extract of coca leaf, and that sample certainly did differ both in odor and flavor from 'Merchandise No. 5.' " (Rec., 2370).

IF COLA NUTS ARE USED IN MAKING "MERCHANDISE NO. 5," NOTHING OF ANY VALUE FOR FLAVORING PURPOSES IS OBTAINED THEREFROM.

The addition to "Merchandise No. 5" of such of the constituents of the cola nut as 20 per cent. alcohol would extract, would have no appreciable effect whatever on the

"Merchandise No. 5" from any standpoint. Dr. Fuller enumerates the infinitesimal particles that would be extracted, as follows:

"From the cola nut you would get caffeine, a quantity of theobromine, sugar, coloring matter, protein material, and get soluble mineral substances that are in the product." (Rec., 2356).

It is admitted that none of these substances would have any effect on the flavor, taste or aroma of "Merchandise No. 5."

DR. CHARLES E. CASPARI:

"Cocaine does not in the least add anything to the flavor of a product, *nor does caffeine*." (Rec., 905).

DR. H. C. FULLER:

"Caffeine has a taste; it is bitter. I don't know whether it adds any taste to a drink of this sort. I doubt it. I don't think it affects the taste one way or the other. (Rec., 2354). *** Theobromine is not a flavoring agent. I don't know the quantity of sugar in the cola nut. I don't know what the coloring matter is in the cola nut which I spoke of a while ago. The protein material in the cola nut is probably more or less similar in character to the protein material which I spoke of as being in the coca leaf, *but* [and] the same is true with respect to the soluble mineral substances in the cola nut. You ask if the only flavoring agent in the extracts that have been talked about is sugar; I don't know much about the flavors from cola. I am not qualified to express an opinion about it." (Rec., 2359).

After Dr. Kessler had made the tests heretofore de-

scribed on "Merchadise Nq. 5" made without the cola nuts to find out just what is obtained from the coca leaves he then tested "Merchandise No. 5" made exactly as Dr. Caspari says the Schaeffer Alkaloid Works makes it for plaintiff, cola nuts and all, and subjected that to analysis, with the following result:

"I made an analysis of 'Merchandise No. 5' made according to this process I have detailed, with coca leaves, sawdust and cola nuts, in the quantities specified by Dr. Caspari. 'Merchandise No. 5' made with cola nuts contains very little more substance than the 'Merchadise No. 5' made without the cola nuts. The cola nuts have very little extractive matter of any kind in them. (Rec., 2471). *** The alcohol extracts from the sawdust one-half as much material as it extracts from the cola nuts. (Rec., 2472). *** This merchandise consists of 1.35 [per cent.] tannin and 1.03 per cent. of indefinable extractive, [and] contained no gums, fats, oils, wax or resins. *** 'Merchandise No. 5' made without cola nuts contains 2.25 per cent. of solid matter. When made with cola nuts it contains 2.38 per cent. solid matter, the remaining being alcohol and water. 'Merchandise No. 5' consists of 81.75 per cent. of water and 15.87 per cent. of alcohol. These percentages are by weight. I used 20 per cent. alcohol in making it by volume. It contains 2.38 per cent. of solid matter, of which practically half is tannin and the other half is indefinable extractive. It also contains 27-1000 of a per cent. of caffeine,—that is, 0.027. *** 0.027 of a per cent. of caffeine is not an appreciable quantity of it. *** If 27 3-4 pounds of caffeine were used in making a batch of this syrup, (1250 gallons of this syrup,) there would be 700 times as much caffeine added as would be introduced by the caffeine pres-

ent in 'Merchandise No. 5. made from cola nuts. * * * This would amount in percentages, to 3-10,000 of one per cent. of caffeine gotten from the cola nuts as against 21-100 of a per cent. of caffeine added, or one is 700 times larger than the other. I was simply going to say that you would have to drink 700 glasses to get as much caffeine from a product made entirely from cola nuts as you would in one that is made with the added caffeine.' (Rec., 2471-2).

It is admitted that the total percentage of caffeine in plaintiff's product is .21 per cent. (*Dr. Fuller*, Rec., 2273).

**"MERCHANDISE NO. 5" CONTAINS NOTHING
WHATEVER FROM THE COLA NUT.**

Dr. Kessler was working with a mixture in which cola nuts had been actually used, and used in the quantities said by Dr. Caspari to be used by the Schaeffer Alkaloid Works in making plaintiff's "Merchandise No. 5." But it seems that, as a matter of actual fact, the "Merchandise No. 5" which the Schaeffer Alkaloid Works manufactures for plaintiff does not contain anything whatever obtained from the cola nut, and, therefore, that plaintiff's so-called "Coca-Cola" syrup does not contain anything from the cola nut. The fact is conclusively demonstrated by the following:

The amount of caffeine present in cola nuts varies with each nut, as previously noted.

SAMUEL C. DOBBS:

"Cola nuts *** do not run uniformly in percentage of strength—no crude product does." (*Rucker Rec.*, 396).

And yet the "Merchandise No. 5" which plaintiff uses always has exactly the same uniform strength of caffeine.

DR. CHARLES E. CASPARI:

"I have made a number of determinations of 'Merchandise No. 5' and in each instance it had the same amount of caffeine exactly." (Rec., 912).

The quantity of caffeine which 20 per cent. alcohol extracts from powdered cola nuts is around .027 per cent., as shown by Dr. Kessler's actual tests. (Rec., 2471). But the "Merchandise No. 5" that plaintiff uses contains only .01 per cent., or less than half the quantity that would be extracted from the powdered cola nuts by 20 per cent. alcohol, if cola nuts were really used. This fact precludes the possibility of accounting for the uniformity of the caffeine contents of "Merchandise No. 5" by pretending that pure caffeine is added to that obtained from the cola nuts to insure a uniform percentage.

DR. H. C. FULLER:

"Q.—State whether or not you have examined 'Merchandise No. 5' with a view to ascertaining whether or not there was any cola shown, and, if so, what percentage of cola you found? A.—I stated that I found 1-100 of one per cent. of caffeine." (Rec., 2378).

The mere presence of caffeine in "Merchandise No 5" is no indication whatever that cola nuts are used in its manufacture. Caffeine is caffeine, no matter where

you get it. Chemically it is identically the same substance whether it comes from coffee, tea, guarana, Paraguay tea, mate, Youpon, or cola nuts. The source from which it is derived cannot be ascertained by a chemical analysis of the caffeine itself.

DR. H. C. FULLER:

"You hand me some caffeine crystals; I could not tell you from where or whence that caffeine was derived. Caffeine is caffeine." (Rec., 2402). *** Caffeine *** when it is obtained alone and purified is not an extract of cola, *which* [but] is identical with caffeine which is obtained from coffee, tea, *durana* [guarana]." (Rec., 2380).

SAMUEL C. DOBBS:

"Q.—I will get you to state whether or not there is any difference in the caffeine, whether you get it from coffee, tea, or cola nuts? A.—Absolutely none. Q.—Chemically it is identical, wherever you get it? A.—Yes, sir. (*Rucker Rec.*, 400). *** Then the chemist, Mr. Dobbs, can't tell whether the caffeine came from pure caffeine direct, or whether it was one of the properties of the cola nut? A.—Oh, no." (*Rucker Rec.*, 404).

ASA G. CANDLER:

"Q.—I will get you to tell the jury if it is possible for that, or any other, chemist, in making an analysis of 'Coca-Cola', to tell where the caffeine that entered into the 'Coca-Cola' comes from,—whether from the cola nut, or whether it is pure caffeine? A.—No. All caffeine is caffeine, I don't care where you get it. (*Rucker Rec.*, 429).

If cola nuts were used in the manufacture of "Merchandise No. 5," then the analysis of it, or of "Coca-Cola" syrup, would show the presence, not only of caffeine, but also of theobromine and cola tannin, which would be extracted from the cola nuts by the 20 per cent. alcohol along with the caffeine. (Rec., 905, 2356, 2471; *Rucker Rec.*, 439).

"If there was absolutely no cola nut present, we could say, by a good deal of hard work and investigation, that there was no cola nut there. For instance, if we examine for tannin, and find none, then we examine for theobromine; and if we find none, then we examine for cola red; and if we find none, then we may say there is no cola nut there, and at once go from it." (*Rucker Rec.*, 439).

DR. H. C. FULLER:

"The property of the cola nut which I found in 'Merchandise No. 5' was caffeine. I didn't find anything else. (Rec., 2363). *** It is a fact that I did make an analysis of 'Coca-Cola' syrup to determine whether there was any theobromine present, and that I never found any theobromine therein. (Rec., 2370). *** No, I have never determined the quantity of tannin in 'Merchandise No. 5.' I determined that [the] tannin in 'Merchandise No. 5' was coca tannin instead of cola tannin. (Rec., 2363) *** You ask if I am able to state definitely and certainly that the tannin which I discovered in 'Merchandise No. 5' was necessarily the tannin of the coca leaf and not the tannin of the cola nut; I am absolutely positive that it was the tannin of the coca leaf." (Rec., 2364).

Dr. Caspari likewise admits that the only substance he was able to find in "Merchandise No. 5" that could have come from cola nuts was caffeine. (Rec., 913).

It would seem, therefore, that plaintiff just puts a tiny speck of pure caffeine into "Merchandise No. 5,"—a definite and uniform quantity being used each time,—for purposes of analysis only, to afford some slight basis for the pretense that cola nuts are used in its manufacture.

**"MERCHANDISE NO. 5" CONTRIBUTES
NOTHING TO "COCA-COLA" SYRUP.**

In making its so-called "Coca-Cola" syrup plaintiff uses sixteen gallons of "Merchandise No. 5" to make 1250 gallons of the completed syrup.

DR. CHARLES E. CASPARI:

"In making soda fountain syrup, there is used about 16 gallons of 'Merchandise No. 5' in making 1250 gallons of syrup. *** It amounts to a little bit less than 2 per cent. (Rec., 911).

DR. J. J. KESSLER:

"If 16 gallons of 'Merchandise No. 5' were used in making 1250 gallons of 'Coca-Cola' syrup, the percentage of 'Merchandise No. 5' in the syrup, by volume, amounts to something less than 2 per cent; by weight it figures exactly 1 per cent.,—one part per hundred by weight. In common chemical results, generally speaking, weights are used because you can handle weights. You are handling quantity there, so that in my figures I am giving you I am referring to percentages by weight almost en-

tirely. There is now,—to every hundred pounds of syrup, there is one pound of ‘Merchandise No. 5’ The solid matter contributed by ‘Merchandise No. 5’ to a hundred pounds of syrup is .002 per cent. by weight. That does not contain any of the essential oils, or other flavoring material, the bouquet, of either coca leaves, cola nuts, or acids. I have shown that that consists approximately of one-half tannin, one-half indefinable extractive material. The indefinable material has the taste,—just like the taste,—straw would have if you boiled it in water. It has no character. (Rec., 2474-5). *** The percentage of solid matter in ‘Merchandise No. 5’ as compared with the percentage of solid matter in ‘Coca-Cola’ syrup,—I will only give round numbers, so that it will not be necessary to carry them out. There is 2,500 times as much sugar; there is 60 times as much caramel; there is 210 times as much caffeine; there is 60 times as much glycerine; there is 20 times as much phosphoric acid; there is 20 times as much of other flavoring matter; there is 30 times as much lime juice; and there is 2,000 times as much water. ‘Those are all in round numbers.’ (Rec., 2478).

By adding these multiple figures, it will be seen that the quantity of total solid matter supplied to “Coca-Cola” syrup by “Merchandise No. 5” is one part in 4,900. This is merely in round numbers. Dr. Fuller worked it out with the precise figures, taking into consideration the fractions which Dr. Kessler disregarded, and he found the proportion to be one part in 5,283.

DR. H. C. FULLER:

“Knowing that there are 15 gallons of ‘Merchan-

dise No. 5' put in the 1250 gallons of syrup, you, of course, can at once figure how much of this would be due to coca and cola in that 1250 gallons. Q.—What did you find it to be? A.—One part in 5,283." (Rec., 2382).

DR. J. J. KESSLER:

"If you were to make up a glass of 'Coca-Cola,' using, say, $1\frac{1}{2}$ ounces of 'Coca-Cola' syrup, there would be $656\frac{1}{4}$ grains of total matter, including 271.55 grains of water and 386 grains of solid matter. The solid matter of 'Merchandise No. 5' in $1\frac{1}{2}$ ounces of 'Coca-Cola' syrup is .13 of one grain." (Rec., 2478-9).

This .13 of a grain of solid matter thus supplied by the "Merchandise No. 5" is the sum total of everything that is derived from the coca leaves, the sawdust and the cola nuts (cola nuts having been actually used by Dr. Kessler in the "Merchandise No. 5" he prepared to make his tests with). In round numbers, the total contribution of "Merchandise No. 5" is 1-8 of a grain of solid matter. But Dr. Wesener admits that even 5-16 of a grain,—or, in round numbers, 1-3 of a grain,—of fresh unexhausted coca leaves, which contain all the cocaine and other alkaloids they normally contain and all their other constituents in normal quantities, is not an appreciable quantity of the drug.

DR. JOHN A. WESENER:

"I do not know that five-sixteenths of a grain of coca leaves would be much of a quantity. It probably could be analyzed and proved that there were

traces there, but it would not be what I would consider an appreciable quantity." (Rec., 932).

Referring to the 2 per cent of "Merchandise No. 5" that is used in making plaintiff's syrup, Dr. Fuller said:

"Q.—Would, or not, 2 per cent. impart a flavor to 'Coca-Cola' syrup? A.—It would not. (Rec., 2389) *** Q.—Have you tried mixing 'Merchandise No. 5' with 'Coca-Cola' syrup to see whether or not any flavor is imparted to the syrup by the mixing of the 'Merchandise No. 5'? A.—No, sir, I have not—not with 'Coca-Cola' syrup. Q.—I didn't mean 'Coca-Cola' syrup, but syrup independent of the 'Merchandise No. 5,' and then adding the 'Merchandise No. 5' to the simple syrup? A.—Yes, sir, I have. Q.—State whether or not there is any taste imparted to the mixture after the 'Merchandise No. 5' is added? A.—There is not. (Rec., 2386-7). *** Q.—Now I will ask you to state whether or not you have had occasion to test the 'Coca-Cola' syrup, as compared with 'Merchandise No. 5,' and likewise as compared with coca extract, to ascertain whether or not there is any flavor imparted to the 'Coca-Cola' syrup by either 'Merchandise No. 5' or the coca extract? A.—I have. Q.—Is there, or not, any odor or flavor imparted thereby? A.—There is not." (Rec., 2383-4).

DR. J. J. KESSLER:

"Q.—Doctor, state whether or not the flavoring capacity of this remaining extractive you speak of,—the quantity of it that enters into 'Coca-Cola' syrup,—could possibly flavor or modify its flavor to any appreciable extent? A.—By limiting my answer to a question of fact, I have added ten times

the amount of 'Merchandise No. 5' to 'Coca-Cola' syrup than there is ordinarily present in it, and I find that the introduction of this amount of 'Merchandise No. 5,' which amounts to increasing the 'Merchandise No. 5' by 1,000 per cent., has no effect whatever to me on the taste of the syrup, with the exception that it makes it slightly less sweet and a little less sour, because it has diluted the syrup to some extent, but it has not changed the flavor of the syrup in the least. A bottle (marked *defendants' exhibit 236*) is original 'Coca-Cola' syrup which I purchased from a wholesale drug house in St. Louis in its original container. A bottle (marked *defendants' exhibit 237*) is the same 'Coca-Cola' syrup to which I have added ten times the amount of 'Merchandise No. 5' which it ordinarily contains. I stated that the syrup was a little less sweet and a little less sour, which is due to the dilution,—slight dilution,—of the syrup. The gravity of the syrup is reduced slightly by the introduction of this thinner material. It is reduced from 1.26 down to 1.23. I could not detect any characteristic flavor of the coca in the second sample, *Exhibit No. 236 (237)*. It brought out nothing. It added nothing *in* [to] the taste of the original syrup whatever. The effect of adding to 'Coca-Cola' syrup ten times the quantity of 'Merchandise No. 5' that actually enters into it of water would have the same effect. It would dilute it that much. 'That is the only difference I noticed.' (Rec., 2476-2478).

Plaintiff's chemists attempt to explain this away by stating that the flavor of "Coca-Cola" syrup is a composite flavor, consisting of a blend of many flavors with no one flavor predominating, and that that is why the

marvelous odors, aromas and flavors pretended to be obtained from the coca leaves and cola nuts cannot be detected in the finished syrup.

DR. H. C. FULLER:

"No, I was not able to detect the characteristic odor of coca leaves, or the extract of coca leaves, in 'Coca-Cola' syrup, nor was I able to detect the characteristic flavor of coca leaves, or extract of coca leaves, in 'Coca-Cola' syrup. *** The flavor of 'Coca-Cola' syrup is not the flavor of any one thing. It is a very peculiar blend in which no one thing sticks out more than anything else." (Rec., 2319).

DR. CHARLES E. CASPARI:

"If you put in your $27\frac{3}{4}$ gallons of flavoring which you have indicated, consisting of orange peel, lemon peel, limes, and essential oils, dissolved in alcohol, you could not pick out, in the first place, in that flavor, by itself, any predominating flavor; it would be a blend; and, if you added vanilla to it, again you would change the blend,—change the flavor,—but you would still have only a blend. Now, when you mix all that flavor which you have blended with the flavor which was derived from 'Merchandise No. 5,' you again have a blend, and you have not the flavor of 'No. 5,' nor have you the flavor of vanilla, nor have you the flavor of orange, nor have you the flavor of any one of the single ingredients which you have added; but you have got a composite flavor which is made up of all of them. That is perfectly analogous to extract of vanilla, which contains, as its chief ingredient, vanillin, and yet, if you make a solution of vanillin in alcohol or water, it is not identical with the odor of

extract of *vanillin* [vanilla], because one is a single substance and the other is a blend. That is what you have in 'Coca-Cola.' You have a blend of various ingredients and no single one predominates." (Rec., 914).

DR. JOHN A. WESENER:

"There are many flavors that are used in drink and food in which flavor [that] has been put in loses its character and identity absolutely. Take, for example, Creme de Menthe, this French drink, which is a cordial. To drink that you would believe that it is simply composed of alcohol, syrup, and a very fine quality of oil of peppermint. If you were to make such a mixture up for your analysis you would find that you would have a very, very harsh drink as compared to Creme de Menthe, for the reason that Creme de Menthe contains vanilla flavor. You do not taste the vanilla in that at all, but that smoothes it down and makes it a beautiful blend. The same thing is true with white crystal syrup, a corn syrup put out by the Corn Products Company. They put on that label 'flavored with vanilla.' That does not mean that it has a vanilla flavor, but that it is flavored with vanilla. You cannot taste the vanilla in it at all, but if you were to omit the vanilla flavor in the white corn syrup you would have a very inferior tasting product. That smoothes it off and secures a very characteristic flavor which the consumer wants. I believe the same thing is true with reference to using 'Merchandise No. 5' in the manufacture of 'Coca-Cola.' It gives character to the drink, which, without it, it would not have." (Rec., 929-30).

If "Merchandise No. 5" really played this much of a part in plaintiff's syrup, still that wouldn't justify a description of the stuff as "Coca-Cola," any more than the part played by vanilla extract in Creme de Menthe would justify a description of that product as "Creme de Vanilla." But the truth is that "Merchandise No. 5" does not begin to play even that much of a part in plaintiff's syrup. While you may not be able to taste the flavor of vanilla in Creme de Menthe, or in White Crystal Corn Syrup, nevertheless you can certainly taste the flavor,—and a very strong, concentrated flavor,—of vanilla in the alcoholic extract of vanilla that is put into these products. But you cannot detect the slightest trace of any odor, flavor or aroma of either coca leaves or cola nuts in "Merchandise No. 5," (Dr. H. C. Fuller, Rec., 2361, 2390). Taking his cue from the theory advanced as to the syrup, Dr. Fuller tried to explain this away by saying that "Merchandise No. 5" is itself a blend in which no one flavor predominates, and that that is why the marvelous odors, aromas, and flavors of coca leaves and cola nuts which "Merchandise No. 5" is said to impart to plaintiff's syrup cannot be detected even in the "Merchandise No. 5."

DR. H. C. FULLER:

"You ask if, in my opinion, it is possible for a human being, even with a very highly developed sense of smell or taste, to detect the characteristic odor or flavor of coca leaves in 'Merchandise No. 5;' well, I don't know. *** Whether anybody could or not, I don't know,—I can not. (Rec., 2367) *** But, as I have said, 'Merchandise No. 5' is not an

extract of coca leaf; it is a blend, and a blend very seldom takes the characteristics of its components. (Rec., 2370). You see, they have a blend there in 'Merchandise No. 5.' There is not any one ingredient that is predominant over the other." (Rec., 2367).

"Merchandise No. 5" is indeed a blend. It is a blend of water, alcohol, a minute quantity of caffeine, which does not affect its taste (Dr. Caspari, Rec., 905; Dr. Fuller, Rec., 2354), a barely perceptible trace of chlorophyl, which is the coloring matter that gives the green color to all green vegetation (Dr. Caspari, Rec., 908; Dr. Kessler, Rec., 2469) and which has no taste itself and cannot impart any (Dr. Fuller, Rec., 2356-7), and the tannin obtained from coca leaves and sawdust. In other words, the marvelous flavors and odors that are blended in "Merchandise No. 5" are the flavor and odor of 20% alcohol, and of sawdust—and coca-tannin.

With this fact admitted, all that was left upon which it was possible to base the pretense that "Merchandise No. 5" is an extract of coca and cola and imparts the odors and flavors of those drugs to plaintiff's syrup, was the trace of coca tannin which forms, with the 20 per cent. alcohol, the "blend" of "Merchandise No. 5."

"The only thing obtained from the coca leaf which is present in this extract we have been speaking of,—extracted in the manner heretofore outlined,—that really has got a flavor, or that really tends to flavor anything in which it is put, would be the tannin." (Rec., 2359).

**THE TRACE OF COCA TANNIN IN "MERCHANDISE NO. 5"
ADDS NOTHING TO THE FLAVOR OF "COCA-COLA" SYRUP.**

Accordingly, in a desperate effort to save his face and his client's cause, Dr. Fuller promptly attributed valuable flavoring properties to this trace of tannin. Notwithstanding the admitted fact that this tannin is so effectually "blended" with the 20 per cent. alcohol that its presence cannot be detected by either taste or smell even in that weak solution, and notwithstanding his previous unequivocal declarations that tannin is not a flavoring agent (Rec., 2394), and that "there is no flavor or odor of coca leaf in 'Merchandise No. 5,' " (Rec., 2390), Dr. Fuller unblushingly swore:

"There is a flavor of coca leaf in 'Merchandise No. 5,'—a flavor due to the tannin. (Rec., 2369).

*** This tannin from the coca leaf has flavor and taste. A flavor agent may be one that imparts a characteristic flavor to the mixture to which it is added, or it may be one which in itself has no special value as far as producing flavor by itself is concerned, but which acts as a blend to produce, with other substances, a pleasing or otherwise desirable flavor. You ask if I would say, or not, that the tannins from the coca leaves act in making up a part of the blend that goes to make up the full flavor of 'Coca-Cola;' they do. (Rec., 2401). *** Tannin has flavoring properties; it might be termed a flavoring agent. It certainly adds to the blend of this product in a very pleasing way." (Rec., 2354).

Then he turned around and let the cat out of the bag:

"It ["Merchandise No. 5"] would unquestionably act as a blend, and the blend would produce the very

pleasant taste that 'Coca-Cola' has. Just how *appreciable* this would be is something I cannot say." (Rec., 2369).

Of course "Merchandise No. 5" would act as a blend, —so would water; so would anything. But, if it did not *appreciably* "add to the bland," it might just as well be dispensed with. Even if it were possible to assume, for the moment, that this tannin might have some slight affect upon the flavor of the syrup, that would not justify the statement that the product was "Coca-Cola." The tannin extracted from the coca leaf is not coca, any more than the tannin extracted from tea leaves is tea, or than the oxygen liberated from water, is water, and it certainly is not cola. As a matter of fact, however, Dr. Fuller's first statement, that "tannin is not a flavoring agent," and that "there is no odor or flavor of the coca leaf in 'Merchandise No. 5,' " spoke the truth.

DR. WILLIAM M. SIMONSON:

"Tannin, at least to my senses, has almost no flavor whatever." (Rec., 2506).

It has a slight astringent taste, but that is more like what Dr. Fuller says of the taste of the acids in plaintiff's syrup, namely, "that is really not a taste, it is really more of a sensation." (Rec., 2319).

But, however that may be, the tannin that it supplies to plaintiff's product by "Merchandise No. 5" is present in the syrup in such an absolutely inappreciable quantity that any taste it might have independently is completely annihilated by the greatly preponderating

mass of other ingredients with which it is mixed, and its capacity to effect the "blend" to the slightest extent is absolutely destroyed.

DR. CHARLES E. CASPARI:

"I can conceive of flavors being so highly diluted that you could not recognize some of them. *** You can pitch the strongest flavor into the Atlantic Ocean and it will be annihilated." (Rec., 916).

Dr. Kessler shows that "there is 2,000 times as much water" in plaintiff's syrup as there is solid matter contributed by "Merchandise No. 5" (Rec., 2478), so that there is 4,000 times as much water in the syrup as there is tannin supplied by "Merchandise No. 5,"—and of this tannin only five-sixth is coca tannin, the other one-sixth being sawdust tannin. Thus, whatever taste the coca tannin may have is as effectually annihilated by being diluted with more than 4,000 times its weight of water,—that is, of being diluted to the extent of over 400,000 per cent.,—as if it had been "pitched into the Atlantic Ocean."

If this were not enough to destroy it completely, then its absolute destruction is accomplished by the dominating presence in the syrup, in addition, of 5,000 times as much sugar, 120 times as much caramel, 420 times as much caffeine, 120 times as much glycerine, 40 times as much phosphoric acid, 40 times as much strong, concentrated flavoring oils and aromatics, and 60 times as much lime juice, or, in all, 9,800 times its weight of other material, which would make the total percentage of di-

lution in the syrup amount to 980,000 per cent.,—almost a million per cent.

Even the taste of other ingredients of the syrup which have a much stronger and more pronounced taste than this trace of tannin, and which are present in the syrup in many times more appreciable quantities, is completely annihilated by the dominating presence of the actual flavoring ingredients, and rendered powerless to appreciably affect “the blend.” Take, for instance, the caffeine. That has a taste. It is bitter, like quinine. It is present in 420 times as great a quantity as this tannin, and its taste is stronger than that of tannin. Yet it imparts not the slightest taste to the syrup.

DR. J. J. KESSLER:

“Caffeine has a bitter taste, and a stronger taste than the solid matter in ‘Merchandise No. 5’ (Rec., 2478). *** There is very many more times of caffeine in ‘Coca-Cola’ syrup than there is of tannin. Now caffeine and tannin taste something alike,—both taste something like quinine,—but you can’t taste the caffeine in ‘Coca-Cola’ syrup and you can’t taste the tannin.” (Rec., 2491).

DR. H. C. FULLER:

“Yes, sir, caffeine has a taste; it is bitter. I don’t know whether or not it adds any taste to a drink of this sort. I doubt it. I don’t think it affects the taste one way or the other, nor do I think it would modify the taste. If a drink which was made up in exactly the same way that ‘Coca-Cola’ is made, with all the other ingredients in it, and had caffeine in it in the proportion that it is in ‘Coca-Cola’ syrup,

[w]as compared with a drink made up identically the same way, *and*, [but] without any caffeine in it at all, I don't think there would be an difference between the two samples in taste." (Rec., 2354).

Again, take the caramel. There is 120 times as much caramel in plaintiff's syrup as there is tannin supplied by "Merchandise No. 5," and caramel has an incomparably stronger flavor than the tannin; yet the caramel in plaintiff's product has no appreciable effect whatever on its taste or flavor.

DR. WILLIAM M. SIMONSON:

"Caramel has a characteristic flavor. It is used as a flavoring agent, I understand, in making confectionary. *** The flavoring of caramel is very considerable, it is hardly to be compared with that of tannic acid." (Rec., 2506).

DR. J. KESSLER:

"Caramel coloring has a flavor *** but it is used primarily for the purpose of coloring, of course." (Rec., 2501).

DR. CHARLES E. CASPARI:

"The color of 'Coca-Cola' is produced by caramel, which is commonly known as burnt sugar, obtained by heating sugar to a certain temperature when the change known as caramelization takes place converting the sugar into caramel. The caramel in 'Coca-Cola' merely colors it. It has no other function whatever." (Rec., 902).

DR. JOHN A. WESENER:

"I think the only function which caramel per-

forms in 'Coca-Cola' syrup is to give it its color." (Rec., 923).

DR. WILLIAM P. HEATH, of the Pratt Laboratory, Atlanta, (plaintiff's witness):

"The coloring I speak of is caramel,—really, burnt sugar. Yes, sir, that coloring is used in 'Coca-Cola' to give it its characteristic color. No, sir, it does not serve any other purpose in 'Coca-Cola' except to give it its color. *** Caramel has a taste, by itself,—it has a taste,—but that taste is completely destroyed when it is put into 'Coca-Cola' syrup. *** I have tried it with and without the caramel, and I didn't notice any difference." (Rec., 415).

SAMUEL C. DOBBS:

"The color of 'Coca-Cola' is a caramel color, or about the color of port wine. *** That color is produced by the addition of burnt sugar, which is used for coloring and for no other purpose whatever. (Rec., 319) *** I know that they do not put caramel in there for any other purpose than just to color the drink, because the Coca-Cola Company has been making it and I know that caramel has no effect upon the taste. We have experimented by making it with and without the caramel, too. It has been done here in our laboratory in my presence and under my observation. No, I do not say that caramel has no taste, at all; I say that caramel in 'Coca-Cola' has no effect upon the taste. Caramel in its concentrated form has a rather bitterish, acrid taste." (Rec., 325).

If this were not enough to thoroughly expose the ab-

sence of any foundation for Dr. Fuller's ill-starred effort to make it appear that this tannin is a desirable property in plaintiff's syrup, and that it is designedly put in there for the wonderful effect it has upon the flavor, then the finishing touches are administered by a little advertising pamphlet gotten out by the Coca-Cola Company and given wide circulation, entitled "The Truth about Coca-Cola," which is in evidence as *plaintiff's exhibit 90*. Dr. Fuller admits that, "As far as I know, the only thing from which 'Coca-Cola' syrup could get tannin is from 'Merchandise No. 5' " (Rec., 2332); and yet, in telling "the 'Truth about Coca-Cola,'" plaintiff unequivocally states:

"This is a book of information—not of defense. We are putting this book into your hands with the simple purpose of telling you just exactly what 'Coca-Cola' is,—what its physiological action is,—what it is made of. *** What are the 'effects' of 'Coca-Cola' physiologically? Outside of its perfect deliciousness and palate-pleasing qualities, what does it do? The answer is perfectly simple. It has just exactly the same result as a cup of tea or coffee, except that 'Coca-Cola' contains no tannic acid, like tea. No empyreumatic oils, like coffee. Very often tea gives indigestion. That's the tannin in it. Tannin does nothing more or less than tan (*turn into leather*) the albuminous foods in your stomach. Leather is a mighty hard thing to digest. Therefore the indigestion. *** Now here is 'Coca-Cola,' containing the good feature of tea and coffee,—the caffeine,—yet *without the tannic acid* of the tea and the deleterious oils of the coffee. *** Tea, coffee and 'Coca-Cola' relieve headache by refreshing the nerves and not by deadening them. In relieving the

headache, 'Coca-Cola' is superior to tea or coffee, not because it contains more caffeine, for it only contains one-third to one-half as much, but because '*Coca-Cola*' is free from tannic acid." (*Plaintiff's Exhibit 90*, pp. 1, 6, 8, 9 and 16).

On pages 4 and 5 of this booklet is displayed a copy of a letter from J. C. Peacock to the Coca-Cola Co., dated Philadelphia, Oct. 12th., 1907, in which Dr. Peacock reports the results of a "very careful analysis of 'Coca-Cola,' " in part as follows:

"A glass of 'Coca-Cola' contains one and one-quarter grains of caffeine; a cup of fair quality tea or coffee contains just as much of this substance, and the better the quality of coffee and tea the more caffeine it is likely to contain. There are *tannic substances* in tea and coffee which are more or less disturbing to the digestive function. These objectionable substances are not present in *Coca-Cola*."

Dr. Kessler shows why tannin has a deleterious effect upon digestion:

"A great many tannins render gelatine insoluble, and this fact is made use of in the tannin industry. When a hide is treated with tannin, it is for the purpose of rendering these gelatin-like substances insoluble, making the hide tough and more impervious to water." (Rec., 2484).

Either plaintiff is grossly misrepresenting its product to be entirely free from all injurious tannin, or else the tannin supplied by "Merchandise No. 5" is so absolutely inappreciable as to fully justify the statement that "'Coca-Cola' is free from tannic acid," and that "these ob-

jectionable tannic substances are not present in Coca-Cola."

This is even admitted by Dr. Fuller himself. He made a very careful and painstaking analysis of plaintiff's finished syrup to see if he could not find something therein obtained from the coca leaf, and was compelled to state that he could not find a single, solitary thing. Thus:

"Q.—I asked if you did not mean to state that there were no elements in that compound derived from coca leaves? A.—I was not able to find any.

*** Q.—Do you intend to say as an expert, from the analysis that you made, that there are no elements in that compound derived from the coca leaf?

A.—No, sir. Q.—Do you mean to say that there are none, or that you cannot say? A.—There were not any. Q.—So, if it is true there are elements in that compound from the coca leaf, you

failed to find them your analysis? A.—There were not any. Q.—You say there were none? A.—No, sir." (Rec., 2376-7).

No wonder, then, that Dr. Kessler concluded, from his analysis of "Merchandise No. 5" and of "Coca-Cola" syrup, that:

"The presence of whatever there is in 'Coca-Cola' syrup, in the quantity it is, from the coca leaf, would have no appreciable effect one way or the other upon the taste, flavor, or aroma of the beverage. In my opinion, it would have absolutely none. The same is true of the cola nut." (Rec., 2490). *** Q.—Doctor, what conclusion did you draw, as the result of your analysis of 'Coca-Cola'

syrup and the quantity of whatever extract there may be there from the coca leaf and the cola nut, —what conclusion from that did you draw as to the value of the presence of this ‘Merchandise No. 5’ in ‘Coca-Cola’ syrup, if any? A.—I can’t see that it has any value whatsoever. In my opinion it has no value whatever, either from a flavoring or a condiment standpoint, nor does it serve the purpose of adding anything to any extent whatever which could have any purpose of effect,—I don’t say purpose, but which could have any effect.” (Rec., 2491-2).

Of course it has a purpose,—to lend a weak support to the fraudulent pretense that plaintiff’s product is what it is not.

DR. J. KESSLER:

“I have made some analysis of ‘Coca-Cola’ syrup. It is a syrup that consists essentially of 53 per cent. sugar, it is colored with caramel coloring, there has been added to it phosphoric acid, lime juice, and certain other flavoring matters, principally vanilla. I have made a test of ‘Coca-Cola’ syrup to ascertain what flavoring it has. In my opinion the taste of ‘Coca-Cola’ is essentially the taste of lime juice. The taste, of course, is modified slightly by the vanilla and other materials, but the main constituent of the taste, outside of the taste of the syrup, of course, which you taste,—the sweetness of it,—outside of the presence of the phosphoric acid which you taste,—that is the sourness of it,—the principal flavoring substance in it is the taste of limes.” (Rec., 2466).

DR. C. A. MESERVE:

"I have tested 'Coca-Cola' syrup. *** I have compared the aroma of the 'Coca-Cola' syrup and the aroma of the flavors from coca leaves, and I noticed no resemblance,—nothing characteristic in the 'Coca-Cola' syrup of the coca leaf. I noticed one flavor predominant in 'Coca-Cola' syrup,—to me a musty lime juice flavor with the acid more or less characteristic of phosphoric acid or citric acid, a slight strengthened acidity." (Rec., 2465).

In the light of this evidence, the statements of Dr. Caspari and of Dr. Wesener to the effect that "Merchandise No. 5" has a very decided effect upon the taste of plaintiff's product, and that plaintiff's product depends entirely upon "Merchandise No. 5" for its character, must be viewed with undisguised skepticism.

DR. CASPARI SAYS:

"You ask the direct question whether or not the presence of "Merchandise No. 5" in the quantity stated, in 1250 gallons of 'Coca-Cola' syrup, adds any appreciable flavor to the drink whatever; it certainly does, and the evidence of that is this: That two bottles were sent to me, one which contained 'Coca-Cola' syrup made with 'No. 5' and one without 'No. 5' and I was asked to see whether I could distinguish any difference between them in taste and odor, and there was a very considerable difference,—a pronounced difference. Anybody could tell the difference right off. So that a drink that was made without 'Merchandise No. 5' could not possibly be taken for a drink that was made with 'Merchandise No. 5.' " (Rec., 915).

DR. WESENER SAYS:

“I have examined ‘Coca-Cola’ syrup made with ‘Merchandise No. 5’ in it and made without ‘Merchandise No. 5’ and there was quite a difference as to taste. The ‘Merchandise No. 5’ gave the syrup a character which was very distinct, and, without it, it did not seem to have the same flavor, to my taste. I had no trouble at all in telling one from the other when they were put before me as unknown mixtures. I did not know what was in either one of the bottles, excepting that I knew one was supposed to contain ‘Merchandise No. 5’ and the other was to be without ‘Merchandise No. 5.’” (Rec., 929).

and again:

“It [‘Merchandise No. 5’] gives character to the drink, which, without it, it would not have. I could tell it right off if it did not have ‘Merchandise No. 5’ in it.” (Rec., 930).

From this it would seem that there is such a decided difference in taste and flavor between plaintiff’s product, which contains “Merchandise No. 5,” and defendant’s product, which concededly does not contain it, that nobody, in the exercise of ordinary care to ascertain what what he was getting could possibly be deceived in the least, or induced to accept defendant’s product as and for the plaintiff’s. Yet the whole structure of plaintiff’s case is based upon the assertion that the two products are so nearly identical in color, taste and flavor that the difference cannot be detected by the average purchaser, and that consequently the one not only can be,

but is constantly and habitually being, passed off as and for the other.

Perhaps the true explanation of these otherwise highly improbable statements of Doctors Caspari and Wesener is that given by Dr. Fuller:

“Q.—Did you receive from Howard Candler a statement as to the contents of this package of syrup he made up by leaving out the ‘Merchandise No. 5’ that he shipped to Dr. Mallet from his factory, as per his agreement on the witness stand?²² A.—I did. Q.—Assuming that one gallon of the mixture in which ‘Merchandise No. 5’ was not added was made up, and that the mixture of ‘Coca-Cola’ syrup proper, which contained ‘Merchandise No. 5,’ was taken from a 1250 gallon vat, would there, as to the flavoring oils and odors, be any difference, even in batches of that size, independent of the ‘Merchandise No. 5,’ and, if you say so, tell why there would be? A.—There would be. Q.—Why do you say so? A.—In the first place, one of these mixtures was 1250 times greater than the other, and it is a very difficult matter to adjust flavoring agents, and especially flavoring agents of the extreme potency of the oils that are used in this mixture in a small batch exactly to duplicate the *test* [taste] you would get in a larger mass. It is one of the most difficult things in pharmaceutical chemistry to do that. The error of adjustment is increased

²²Samples of plaintiff’s syrup made both with and without “Merchandise No. 5” were sent to Doctors Caspari, Wesener, Mallett, and several others, at the time plaintiff was preparing its defense in the case of the **U. S. v. 40 Barrels, etc. of Coca-Cola**, to qualify them as witnesses in its behalf. As Dr. Mallett was the leading witness for the Coca-Cola Company on that trial, the question was asked with respect to the samples that were sent to him, but there was no difference between those samples and the samples sent Doctors Caspari and Wesener.

many times in the small mixture over a large mixture. It is a very difficult thing in even five gallon batches made up from the same formula to get exactly the same flavor. People can very often tell that. I have had that same experience myself. It is due to the essential oils." (Rec., 2387-8).

If this is not the true explanation, then it is very evident that a deception of some sort was practiced upon Drs. Caspari and Wesener as to the composition of the samples of syrup that they were asked to test. Neither of them had any knowledge as to the composition thereof. They simply tested samples of syrup sent to them by plaintiff, without knowing what those samples contained, except what plaintiff had told them, and ascertained that there was a pronounced difference in the taste between them. It seems perfectly clear from the nature of "Merchandise No. 5" as shown in this record, that if Dr. Fuller's explanation is not correct, these samples could not have been what they were represented to me, or else that imagination or bias stimulated the acuteness of perception of these distinguished chemists far beyond that vouchsafed to ordinary mortals. As said in *Bear Lithia Springs Co. v. Great Bear Springs Co.*, 71 N. J. Eq. 576; 71 Atl. 383:

"The credulity of a court cannot be expected to extend beyond a reasonable limit, and when testimony is given which (opposed to) common knowledge and the experience of mankind, as well as reliable medical evidence, hypothetical testimony which leads to a contrary result must be rejected as of no value. It is testimony but not evidence."

That "Merchandise No. 5," as it is here shown to be, could not have any appreciable effect whatever upon either the taste, flavor, aroma, or physiological effects of plaintiff's product "is in accord with the evidence in the case, and with common sense." (*Bear Lithia Springs Co. v. Great Bear Springs Co., supra.*)

**PLAINTIFF'S REPRESENTATIONS AS TO THE
INGREDIENTS OF "COCA-COLA."**

Notwithstanding the fact that plaintiff's product is not only not a compound or mixture of coca and cola, but that it is, on the contrary, totally devoid of both of those ingredients, and devoid of any appreciable quantity of anything whatever obtained from either the coca leaf or the cola nut, nevertheless plaintiff advertises and sells its product throughout the length and breadth of the land as a preparation of coca and cola,—or, put shortly, as "Coca-Cola,"—and labels the receptacles containing it with the falsely descriptive name "Coca-Cola" and with pictures of coca leaves and cola nuts.

SAMUEL C. DOBBS:

"At present I am vice president of the Coca-Cola Company, in charge of advertising and sales. The history of advertising of 'Coca-Cola' since 1892 is as follows: In 1892 the Coca-Cola Co. spent for advertising \$11,401.78; in 1893 we spent \$12,395.12; in 1894, \$14,538.14; in 1895, \$17,744.22; in 1896, \$23,117.58; in 1897, \$52,405.18; in 1898, \$43,857.62; in 1899, \$48,564.83; in 1900, \$84,507.97; in 1901, \$100,276.01; in 1902, \$149,628.79; in 1903, \$200,941.40; in 1904, \$280,985.12; in 1905, \$356,552.07; in 1906, \$486,553.47; in 1907, \$550,775.12;

in 1908, \$624,077.70; in 1909, \$675,048.59; in 1910, \$853,329.13; in 1911, \$978,329.30; in 1912, \$1,182,-257.29 and in 1913 \$1,186,210.39.

“In all that advertising I have mentioned the predominant feature has been the ‘Coca-Cola’ trademark. *** The name ‘Coca Cola’ was always the dominant central feature of the copy, whether newspapers, magazines, bill-boards, posters, or any other way,—painted walls.” (Rec., 308).

CHARLES HOWARD CANDLER:

“I herewith file as *Plaintiff's Exhibit 88* the label that we use on the barrels and kegs of ‘Coca-Cola.’ We are not using *Exhibit 88* now. It was used until last fall, when the net weight law went into effect. Since then we have been using the label filed as *Plaintiff's Exhibit 89*. These labels are placed on the barrels and kegs containing ‘Coca-Cola,’ and sent broadcast all over the country. The border around those labels purports to be a picture of coca leaves and cola nuts.” (Rec., 440).

DR. H. C. FULLER:

“I haven’t seen the labels on the barrels of ‘Coca-Cola’ in a long time. I saw the labels on those barrels at Chattanooga. I certainly did observe the pictures of leaves and nuts on those barrels. They were coca leaves and cola nuts.” (Rec., 2371).

DAVE S. BAUER:

“Yes, I have seen the ‘Coca-Cola’ label which contains a picture of coca leaves and cola nuts, but I haven’t noticed it enough recently to tell whether or not they still use it. However that was the label they used for year.” (Rec., 541).

**THESE FALSE REPRESENTATIONS RESULT IN
ACTUAL DECEPTION OF PURCHASERS.**

The natural effect of these representations is to produce the belief in the mind of the public that plaintiff's product is a syrup the essential ingredients of which are coca and cola, which, as has been shown, is not true in any sense of the word. The inevitable result is that the public are deceived.

DR. WILLIAM M. SIMONSON, of Cincinnati:

"From hearing the name 'Coca-Cola' I would expect that the product would carry both the ingredients names, namely, coca and cola. (Rec., 2510-11). *** I would expect it to contain the proximate principles of coca, and likewise of the cola nut, that would be soluble in a liquid of that character. The characterizing ingredients of the coca leaf would be the alkaloids. I expected to find, from the leaves, such as would be soluble in a liquid of this kind and character. Cocaine and its associated alkaloids would be soluble in a liquid of this character,—that is, 'Coca-Cola' syrup." (Rec., 2518).

DAVE S. BAUER, a retail druggist of Mobile, Alabama, who has been in the business a quarter of a century (plaintiff's witness):

"I have always understood 'Coca-Cola' was a syrup made with some coca leaves and from cola nuts, and I still understand it that way. I understand that *from the name of the product*, and from information I get in the drug business. I was in the drug business when 'Pemberton's Wine of Coca' was put out years ago, and I was informed that they sold their formula to other parties and that they

then manufactured a syrup,—when ‘Pemberton’s Wine of Coca’ was sold,—as an *extract of coca leaves*.* * *No, sir, I did not get my understanding as to the ingredients of ‘Coca-Cola’ from Dr. Pemberton; I suppose I got it from Pemberton’s salesmen when I was a boy, and *from the name ‘Coca-Cola.’*” (Rec. 540-1).

CLAUDE W. HICKLE, a drug clerk, of Charleston, W. Va. (plaintiff’s witness):

“Yes, sir, I know what coca leaf is. I have heard of it a great deal, we use it quite often in the drug store.* * *When I hear this drink called ‘Coca-Cola’ I suppose it has to have coca leaves in it.* * *If I heard a drink called ‘Lemon Orange’ I would imagine that it would be composed of a combination of lemon and orange.” (Rec. 2064).

JOHN H. BOHNE, an employee of the Liquid Carbonic Co., of St. Louis, a large jobber of “Coca-Cola” (plaintiff’s witness):

“If I heard a drink called ‘Lemon-Orange’ I would think its principal ingredients were lemon and orange. If I heard a drink called ‘Orange-Cola’ I would think it would contain those things,—orange and cola. If I heard a drink called ‘Coca-Cola’ I would think that it contained coca and cola.” Rec. 2046.

S. B. CHRISTY, a “Coca-Cola” bottler, of Murfreesboro, Tenn., (plaintiff’s witness):

“Q. What idea does this word ‘Coca-Cola’ convey to your mind? A. Made from coca leaves and cola nuts, I reckon.” (Rec. 2031.)

I. B. BRAWLEY, one of plaintiff's numerous "spotters":

"If I heard a drink called 'Lemon-Orange' I would naturally conclude, from the name of the drink, that it would have something in there that tasted like lemon and orange, it seems to me. If I heard a drink called 'Lemon-Cola' I would naturally conclude, from the name, that there was lemon about it. * * * I presume it would have a lemon flavor. * * * When I hear a drink called 'Coca-Cola' I would think it has coca in it." (Rec. 2146-7).

T. J. HAZLIP, of Fort Worth, Texas, a retail druggist since 1893 (plaintiff's witness):

"Oh, yes, when I heard this drink called 'Coca-Cola,' that name conveyed to my mind the idea that the drink had coca in it—coca leaves. Yes, sir, as a druggist I also knew that cocaine came from coca leaves." (Rec. 1961.)

Indeed, the name 'Coca-Cola' was found to be so deceptive and misleading that plaintiff was finally obliged, in self-defense, to take steps to counteract, so far as it was able, the widespread misapprehension as to the ingredients of its product which the name "Coca-Cola" had created in all parts of the country. As a step in this direction it prepared and circulated a little booklet heretofore referred to, entitled "The Truth About Coca-Cola," in which "the truth about Coca-Cola" is there stated to be that:

"By many it has been inferred, presumably *from the name*, that 'Coca-Cola' is *made from the drugs coca and cola*, and must, therefore, contain the dangerous substance cocaine. This, however, is not

true, for 'Coca-Cola' does not contain cocaine or any of its derivatives." (*Plaintiff's Exhibit* 90, pp. 4 and 5.

This widespread belief on the part of the public is not only directly confirmed by plaintiff's witnesses, but is plainly reflected in the character of slang used generally throughout the country to indicate the supposed nature of the stuff and what is commonly believed to contain. In many sections of the United States the article is habitually referred to as "*dope*," "*coke*," "*cocaine*," "*sniff*," "*needle*," "*shot-in-the-arm*," "*hop*," "*eye-opener*," "*slow-dope*," etc., and is asked for by these and many other slang expressions of similar import, all more or less indicative or suggestive of what the public believe is the chief active agent of the compound. This significant phenomenon can hardly be accounted for satisfactorily upon any other hypothesis than that advanced by plaintiff itself, namely, that the public have been led to believe from the name 'Coca-Cola,' and from the pictures of coca leaves and cola nuts with which the plaintiff labels its packages, that the stuff is made essentially from the drugs coca and cola, and must, therefore, contain the dangerous substance cocaine.

"Coke" is a slang word meaning "cocaine."²³ "Dope" is a slang word, and is used both as a verb and as a noun. As a transitive verb, it means, "to stupefy, or exhilarate, as by a drug;" as an intransitive verb it means, "to use habitually a narcotic drug." As a noun, it means, "any

²³ "*coke* (2)n. (Slang, Southern U. S.) Cocaine."—**Funk & Wagnall's New Standard Dictionary** (Eds. of 1913 and 1916) p. 523.

narcotic drug.”²⁴ “Shot-in-the-arm” means a shot of cocaine in the arm, or a hypodermic injection of cocaine, while “needle” means the instrument with which the “shot” is administered. “Sniff” means a sniff of cocaine up the nose; “eye-opener” means a “bracer” or stimulant; and “hop,” “slow-dope,” etc., mean, of course, a narcotic drug, such as cocaine, morphine, opium, etc. The significance of so prevalent a use of such expressions in connection with a product like that which plaintiff’s product used to be, and it still supposed by the public to be, is too plain for argument. It reflects the widespread delusion of the public as to the nature and ingredients of the article,—which delusion plaintiff itself has directly brought about, and still continues to foster, by the use of the deceptive name “Coca-Cola” and of the misleading pictures of cola leaves and cola nuts.

²⁴ **“dope.** v.t. (Slang I. 1.) To stupefy or exhilarate as by a drug. *****2.** to map out, as to plan or figure out, as a problem; judge, calculate, forecast; *****as,** to **dope out** a scheme. II. 1. To use habitually a narcotic drug, as morphine. *****dope, n.** 3 (Am. Slang). By extension, any narcotic drug, as morphine. *****dope-fiend.** A habitual user of a narcotic drug. **Dopey. a.** (Slang, U. S.) stupid, as if from opium; dull; heavy. See **dope.”** **Funk & Wagnall’s New Standard Dictionary.** Eds. 1913-1916) p. 749.

“dope. n. 5.—Any drug, such as opium, laudanum, morphine, cocaine, hydrate of chloral, hashish, etc., which has the property of inducing sleep or of stupefying; a narcotic.—**Slang.** 6 A person under the influence of, or addicted to the use of some **dope.**—**Slang. dope. v.** pret. and pp., **doped;** ppr., **doping.** I **trans.**—to drug; to stupefy with drugs such as knock-out drops (hydrate of chloral) or the like. *****Slang. II. intrans.**—To indulge habitually in the use of opium or other drugs, either for the pleasurable sensations produced, or as anaesthetics.—**Slang. dopey. a.**—(See **dopy.**) **dopy. a.** (also, **dopey** dope plus y)—Stupid, as if under the influence of some drug; dull; heavy; also **dopey.”**—**Slang.—Century Dictionary & Cyclopaedia, New Volume (XI)** p. 389 (The Century Company, New York, 1909.)

“dope. n. II.—Any preparation, as of opium, used to stupefy.—**Slang or Cant, dope—v.t.** (a) to give stupefying drugs to.—**Slang ***2.**—To judge or guess; to predict the result of, as by the aid of dope. **dopey. a.**—Affected by dope; esp., sluggish or dull as though under the influence of a narcotic.—**Slang.”** **Webster’s New International Dictionary,** (G. & C. Merriam Co., Springfield, Mass., (1912) p. 662.

This is apparent from the admissions of plaintiff's own witnesses.

GEORGE S. MORSE, buyer for the Economy Drug Store, New Orleans:

"You ask what I understand by the word 'dope;' I understand by that that it must stimulate them some, that's the reason they ask for it in that way. A man who uses 'dope' is the man who seeks a stimulant. Usually it is applied to morphine or cocaine—any opiates. It was once the general impression that 'Coca-Cola' had some stimulating drug in it, and I always thought it myself until I read the report of the Government that it did not contain it. I think it was in the past six months, if I remember right that I read it. Yes, sir, it is the general impression of our customers that it does contain a stimulant of the kind that has been suggested,—cocaine, or morphine, or something like that." Rec. 646-7).

T. J. HAZLIP, of Fort Worth, Texas, a retail druggist since 1893:

"I would say the word 'dope' was originally applied to narcotics,—cocaine, morphine, and such things.***I don't know where it originated, or whether there is any foundation for it, but we all know they have accused 'Coca-Cola' of being doped, and when we apply 'dope' we think of cocaine and morphine,—opiates, things of that kind,—that is my idea about it.***Whenever a man came to my fountain and said 'coke,' I inferred that he meant 'Coca-Cola,' because it was said,—I don't know whether it is true,—that it has cocaine in it.***The word 'coke' has a rather sinister meaning to it, like

'dope'. People use it as 'cocaine.' They call for 'coke' at my fountain even yet.***I remember specifically and positively going over to Terrill and sitting down at a soda fountain with a doctor friend of mine, and he called for a 'coke,' and I asked him, 'Are you taking cocaine?' and he laughed and says, 'That boy knows what I want.' " (Rec. 1960-1).

J. M. PENLAND, a wholesale druggist of Waco, Texas, formerly a retail druggist:

"I have considered the word 'dope' with reference to drugs and narcotics, and in that respect it means morphine or cocaine, usually, or gum opium, or any thing that is used as a narcotic by friends. To me the (word) 'coke' has a similar meaning, because they use it instead of 'cocaine.' I have heard of 'coke-fiends.' The term 'coke-fiend' means a 'coke-fiend' in the sense you probably mean—it may mean a fiend who drinks 'Coca-Cola.' I am not a man who drinks a good deal of it, but to me it would mean using cocaine." (Rec., 1980-1).

JOHN W. GRAHAM, soda dispenser, Mobile, Ala.:

"In my experience the average man does not call for 'Coca-Cola'; he calls for 'coke,' and 'dope,' and 'shot,'—those three words.***What I think a 'shot' means is when a doctor shoots some morphine or cocaine or something in your arm,—that's what I always thought a shot was.***They gave me the impression, when they asked for 'dope' or 'a shot,' that they were asking for a drink that was the equivalent of 'dope' or a 'shot,' and to a certain extent it made me think of what I have often heard, that 'Coca-Cola' has cocaine in it. I can't say that that is the impression of most of those who drink

'Coca-Cola;' some think it, some not. I have talked to some, and they believe they are getting a little cocaine in their drink when they get it." (Rec. 557.)

GUY HENDERSON UPCHURCH, a retail druggist for fifteen years, Mobile, Ala.:

"Usually the term 'dope' means a thing like morphine, cocaine,—things like that. Q77. So when a man calls for 'dope,' you know he wants 'Coca-Cola'? A. At the soda fountain, yes, sir.***Oh, yes, I have heard of a 'dope-fiend,' plenty of them,—'coke-fiends,'—'morphine-fiends,'—several others. No, sir, 'coke' does not necessarily mean 'cocaine;' it is applied to morphine, cocaine, or any other habit-forming drug. Yes, sir, when a man calls for a 'coke,' I know he ordinarily means morphine, or cocaine, or some other habit-forming drug,—that is, if he was at the prescription counter, I would think so; but if he is at the soda fountain and calls for 'dope' or 'coke,' I would think he wanted a drink. The reason why I would think he wanted a drink is because he came to a place to get a drink and we don't serve cocaine or morphine at the soda fountain. The two names, 'dope' and 'coke,' are inseparably connected in my association with 'Coca-Cola.'***If I was at the prescription case, or in the drug department, I would think they meant some habit-forming drug, such as cocaine or morphine. Yes, sir, I think that as a result of long experience as a druggist. I know that cocaine-fiends call for 'cocaine' or 'dope.'***No, I do not claim ignorance of the fact that for many years it was generally supposed that 'Coca-Cola' had cocaine in it,—a great deal of the public supposes that now, so far as that part of it is concerned.***I frequently have the ar-

gument that it contains such things.***I have asked a good many as to what they thought it contained, and they argued with me that they thought it contained those things.” (Rec., 529-31).

DAVE S. BAUER, a retail druggist for twenty-five years, Mobile, Ala.:

“No, sir, when the words ‘dope’ and ‘coke’ were pronounced to me originally they did not convey any meaning to me—nothing more than a common name used for anything that is dopey, or contains an opiate,—something of that sort. These are names that are used under all circumstances. They are often applied to medicine, whether it contains morphine or not.***I would judge the word ‘coke’ in general use to be applied to the word ‘dope,’—it has always struck me that way. Of course, it depends entirely just how the statement is made,—users of cocaine have been designated as ‘coke-fiends,’ and sellers of ‘cocaine’ have been designated as ‘coke-sellers.’ Yes, sir, the names ‘coke’ and ‘dope,’ as they bore themselves in on my mind for many years, indicated what I have just said,—a medicine or a dope of some kind,—if it had in it the element of ‘dope,’ or morphine, or any drug of that kind, that is what it meant.***Yes, sir, when the word ‘coke’ or the word ‘dope’ was originally used with me in regard to ‘Coca-Cola’ it signified something of that kind. I have heard people say that ‘Coca-Cola’ contains cocaine.***I have heard a good many people who have always contended that it had cocaine in it, or some extract of cocaine. That was the general impression for years and years.***The name ‘coke’ implies coca, and cocaine is derived from coca leaves.” (Rec. 538-40).

EDWIN ROY ALBRIGHT, a retail druggist, Mobile, Ala.:

"I don't know why anybody should call a straight drink that had no drug in it 'dope.'***I know the general impression is that 'Coca-Cola' had something in it which led to the use of the word 'dope' as an alternative for 'Coca-Cola'." (Rec. 549-550).

GEORGE L. SEIBERT, soda dispenser, Mobile, Ala:

"XQ-10. You have lived in this world so long or short a time that you don't know whether 'dope,'—
A. Yes, sir, a fiend, or a 'dope-fiend'—the stuff that they take, something on that order. Yes, sir, I know that the word 'dope' as a general thing is a word signifying the use of a drug, or something like a drug,—something that stimulates you.* * *By 'dope-fiend' I mean that different people take 'coke,' for instance, things like that,—cocaine or morphine. Anyone taking cocaine, you call that 'dope,' and it means a drug on the order of cocaine,—that's the only way I have heard of it,—and a drink something on the order of 'Coca-Cola.'***Some of the rank and file of people generally believe there is cocaine in 'Coca-Cola'." (Rec. 553-4).

ROBERT W. ELLIOTT, soda dispenser, Mobile, Ala.:

"These people that come in to drink 'Coca-Cola' in our place ask for it under different names; they ask for it under 'Coca-Cola,—I have heard them ask for it under 'dope,' I have heard them ask for a 'coke,'—I have heard them call for a 'shot-in-the-arm,' meaning 'Coca-Cola,' and I have also heard them call for 'morphine cocktails,'—a good many nicknames, all meaning 'Coca-Cola,'—they are all

satisfied when we give them 'Coca-Cola,' we never hear any complaint.***I don't know, sir, why they should call it 'morphine cocktail,'—it is just a nickname some people have given it. You ask why they should call it 'shot-in-the-arm'; that is just another 'dope,' you know, is a 'shot-in-the-arm.' 'Dope,' in that sense, I suppose, would be cocaine,—something of that kind,—or morphine.***Yes, sir, these customers of ours call for this drink in the language of a 'dope-fiend.'***XQ-17. And you know this language is of a 'dope-fiend,' and consequently supply 'Coca-Cola' when they call for 'dope'? A. Well, working around a place that way, we are supposed to know what he wants,—if he nicknames it, calls it anything else, we are supposed to know he wants 'Coca-Cola.' (Rec. 563-4).

I. V. WOOD, retail druggist, Mobile, Ala.:

"You ask what is the meaning of the word 'dope'; I claim 'dope' has two meanings; it is a slang,—the 'dope on horse races,' 'the dope on base ball game,'—and different things; but when a man comes to the prescription department, I would think he wanted a narcotic if he called for a 'dope.' If he went to a soda fountain, I would naturally think he wanted 'Coca-Cola.'*** The idea originated, I suppose, from the conception that he wanted a dope of some sort,—that is, that it had something in it that stimulated or attracted a man and made him come again." (Rec. 570-1).

C. G. PETERS, a retail druggist for twenty-eight years, New Orleans, La.:

"Yes, sir, I am a retail druggist, and the word 'dope' to a druggist has a meaning to it,—not ex-

actly soda drink, though. It means morphine, cocaine, something like that,—anything of which the drug forms a part. You say you suppose it's true with me, as was the general impression up to a very recent time, that 'Coca-Cola' had something of that kind in it; well as a druggist, I think it did have something in it, and that was pretty generally known, too, and I suppose it was known to my customers." (Rec. 654-5).

CECIL V. ROGERS, a retail druggist for twenty-four years, Dallas, Texas:

"I have had lots of people come into my store, ladies and men, and take a 'Coca-Cola' and claim that it was always relieving fatigue and tired feeling.***I don't know whether it was the general impression or not, but I have heard it said that they thought it contained traces of cocaine. If I get the use of cocaine right, it has an exhilarating effect,—it does exhilarate your nerves.***You ask if 'dope' has not a rather sinister meaning, to the average man; well, I have heard the word 'dope' applied to numerous things, where they would say, 'you can get the proper dope on it,' or 'how it was doped out to me,' and 'dope' is applied to drugs of different kinds where they are narcotic, or exhilarant, or what not." (Rec. 739-40).

JACOB SCHRODT, a retail druggist for twenty-one years, Dallas, Texas:

"You ask if the word 'dope' is not a comparatively new word in regard to 'Coca-Cola;' well, I can't say that it is with me. At least five or six or seven years ago people called it 'dope' because some of them had an idea that 'Coca-Cola' contained stuff

that would make them dopey, and even to this day some of them think so,—nevertheless, it has been proven that it doesn't.***When I say 'dope' in the vernacular of the druggist, I mean anything that will produce a habit; for instance, whiskey might be a 'dope,' coffee might be a 'dope,' because it's a habit-forming drink, and for that reason when they say 'dope' they might mean something else,—anything that's dopey, we understand it to be, either substituted or added to.***'Dope' not only means things of that kind, but things that have a tendency to 'dope' you, or to stupefy you, or to exhilarate you, or anything else that is injurious, such as cocaine,—'give me a shot of cocaine,'—they might mean that if they thought I was selling that, so I want myself right. Yes, sir, 'shot-in-the-arm' is based on either cocaine or morphine, same proposition,—that's a frequent expression.***Yes, sir, they use that name interchangeable with cocaine.***I don't advertise that I sell any 'dope,'—that is, in the way of morphine or cocaine." (Rec. 742-5).

S. Y. ALTHOFF, a retail druggist for thirteen years, Dallas, Texas:

"Yes, sir, I am a druggist, and of course I know what 'dope' means as a druggist. 'Dope' would mean a pharmaceutical drug, a habit-forming drug, such as morphine, cocaine, heroin. 'Shot' is used,—supposed to be a shot of cocaine or morphine in the arm. Yes, sir, I have heard these people call 'Coca-Cola' 'a shot' for short." (Rec. 762).

F. L. SKILLEN, a retail druggist, Dallas, Texas:

"I hardly ever speak of 'Coca-Cola' unless somebody asks me do I think 'Coca-Cola' hurts them, or

something of that kind. I have had such inquiries, yes. I have had them to ask me if there was cocaine or 'dope' in it, as they call it.***I went to Dr. Smart's office and was examined for the Coca-Cola Company as an habitual user of 'Coca-Cola.'***I was examined at the request of the Coca-Cola Company to see what effect it had on me. I don't know why they should have done that. My conclusion was that it was because they wanted evidence to rebut the belief that 'Coca-Cola' was harmful to you.***After that examination somebody asked me where I had been, and I told them, and we naturally entered into a discussion, whether it was harmful or not.***The discussion turned principally on the contents of 'Coca-Cola.' He asked me if I thought there was cocaine in the drink." (Rec. 796-7).

D. R. KEYSER, a retail druggist for nine years, Dallas, Texas:

"We sell a great deal of 'Coca-Cola.'***I haven't any idea why they should call it 'dope,' or 'shot,'—in-the-arm,' unless it is on account of the stimulating effect,—that's the only reason I have why they should call it that." (Rec. 810).

EDWARD T. LANGAN, a lunch-room proprietor, but who was formerly a soda dispenser, Chicago, Ill.:

" 'Dope' means a drug, and when we speak of 'dope,' or a 'dope-fiend,' that means a drug fiend, so that, if they come in and ask for 'dope,' I wouldn't know what to give them unless they explained what they wanted.***In addition to 'coke' and 'dope' I have heard customers using such expressions as 'shot-in-the-arm,' 'eye-opener,'—and Oh, various names.***Yes, I do know that cocaine, or morphine,

is taken that way, by an injection in the arm. That form of expression is equivalent to asking for some drug, and the same way with 'dope.' When they come in there and say, 'Give me a "dope,"' that is practically asking for a drug, a drug drink.***I have had people to ask me if I thought there was cocaine in it." (Rec. 898).

PHILIP JANSEN, an "investigator" employed by Messrs Reed & Rogers, attorneys for Plaintiff, to make certain "investigations" in Chicago:

"Yes, sir, in one of the places where I went on my rounds I asked the proprietor, or the man there, for a 'coke,' and he asked me if I would have it in a glass or in the arm.***These people I went to see were people who dealt in 'Coca-Cola.'***I remember one dealer who said that his customers used to think that it had cocaine in it. At times they ask for it as 'cocaine' and 'morphine.' " (Rec. 965).

F. M. GREEN, a retail druggist for twenty-two years, Atlanta:

" 'Dope' means the influence of some drug to deaden the senses, or something of that sort. Yes, sir, a 'dope-fiend' is frequently used with reference to a cocaine-fiend,—that, and morphine as well." (Rec. 455).

DR. J. D. T. LAWRENCE, a retail druggist for ten years, Atlanta:

" 'Dope' ordinarily would mean some sort of narcotic, sort of like cocaine,—something on that order,—that would be the real impression it would give you you know.***Well, I say, me being a druggist, the idea associated in my mind by the word 'dope'

would be a habit-forming thing, and it's like a man who would take morphine, they would call it 'dope,'—that's the idea, a 'dope-fiend.'***Yes, sir, I think they have gotten to look at it as a slang term or nickname for 'Coca-Cola,' because at first they might have had the impression that it was a 'dope' drink.***I have run across people who thought 'Coca-Cola' had cocaine in it." (Rec. 472).

DAVID G. WISE, a retail druggist, Atlanta:

"Yes, sir, I kow why the name 'dope' is used,—I surmise, I don't know, but I presume it was given it because of the medicinal effect, or the talk way back when it was first manufactured,—some medicinal effect in it.***I don't know whether or not that was due to the impression, at some time or other, that it had cocaine in it. I never heard that spoken of so much as caffeine. The laity,—I doubt if they know the difference in effect of cocaine and caffeine. In these days, though, they have learned a good deal about cocaine, but in those days I doubt if they knew very much about it, so I wouldn't say if it was one thing or the other." (Rec. 475).

SAMUEL C. DOBBS, vice-president and sales-manager of the Coca-Cola Company:

"Young men go in and call for 'dope' and 'coke.' My recollection is that it has been some ten years that I have heard these names used. The first time I heard it was here (in Atlanta) in 1901. The 'Coca-Cola' was getting up quite a little sale at that time, and a Dr. Scott,—an old gentleman with nothing much to do,—noticed the demand for 'Coca-Cola' at Venable's soda fountain, and, from the fact that it had extract of coca leaves in it, apparently came

to the conclusion that it had cocaine in it, and he wrote an article to the 'Constitution' condemning its use and made the statement that it had cocaine in it, and from that arose, we assume, to the best of our knowledge, they got to calling it, as a joke 'coke.' Well, that was the first starting of it,—I have even heard of a boy going to a soda fountain and say, 'Give me a shot-in-the-arm,' and I corrected the boy—over on Alabama and Broad Street. He called for a 'shot-in-the-arm' and the man served him 'Coca-Cola.' ” (Rec. 320-1).

This is confirmed by defendant's witnesses. One or two illustrations will suffice.

A. W. STANLEY, proprietor of a hotel and bar, Chattanooga, Tenn.:

“If they ask me to give them a shot of cocaine, 'Coca-Cola' is, I suppose, what they want. A great many people think 'Coca-Cola' has cocaine in it, you know.” (Rec. 1005).

MAX BLOOMSTEIN, a retail druggist for thirty years, Nashville, Tenn.:

“I cannot say just exactly where the slang 'coke' and 'dope' originated. I suppose it originated because it had the same effect. I have heard the word 'dope' as applied to cocaine, to morphine, and heroin, before I ever heard it applied to a drink, quite a number of years ago.***'Dope' seems to me to be something that stimulates, or makes you feel a little better, or a little different from what you ordinarily did. It was originally applied to morphine and cocaine because it temporarily rejuvenated a man, and I think it was applied to 'Coca-Cola' just after hav-

ing been applied to the cocaine and morphine drugs, that is my idea.” (Rec. 1146).

To appreciate the extent of the almost universal use of these various slang expressions in connection with plaintiff's product, and, therefore, the extent to which such use indicates the deception of the public as to the ingredients of plaintiff's product, it is only necessary to glance at the testimony of a few of plaintiff's witnesses.

D. R. KEYSER, manager of the Stovall Drug Store, Dallas, Texas:

“I have never dispensed anything but ‘Coca-Cola’ in the drug store I have been working at.***I have observed the different names under which customers call for it; they call for it under the name ‘coke,’ ‘dope,’ and ‘shot-in-the-arm.’***I said that practically all of my customers call for it as ‘coke’ and ‘dope.’***Yes, the name ‘Coca-Cola’ is dying out in the trade, being abandoned.” (Rec. 809-10).

W. H. RAMSEY, a retail druggist of Dennison, Texas:

“Yes, sir, out at Dennison the name ‘Coca-Cola’ is passing and going away,—people talk about ‘coke’ and ‘dope.’ I hardly ever hear the name ‘Coca-Cola’ any more.” (Rec. 821).

J. R. SMITH, a confectioner at Pilot Point, Texas:

“At Pilot Point we are carrying on a soft drink business. We sell milk shakes, ‘Coca-Cola,’—signs in the house say, ‘*Coca-Cola Bottling Works, —Call for it by the right name,*’ but nearly everyone says ‘Give me a coke.’ ”***You ask if anyone calls for ‘Coca-Cola’ any more; oh, once in a while a man

comes in and says 'give me a bottle of Coca-Cola.'
 ***Once in a while a man calls for a bottle of 'Coca-Cola.'—At Tioga I have had them say 'give me a shot-in-the-arm',—they mean 'Coca-Cola,' though, of course." (Rec. 825).

PETER CAMARINOS, a Greek confectioner at McKinney, Texas:

"Yes, sir, I do a large 'Coca-Cola' business. You ask how much is called for under the name 'Coca-Cola.' Well they call it 'Coca-Cola,' and they call it 'coke,' and 'dope,' and 'hop,' and 'shot-in-the-arm.' Pretty nearly everyone calls for it under these names, so that the name 'Coca-Cola' is not often used." (Rec. 828).

GEORGE C. KERSHAW, a retail druggist, Dallas, Texas:

"You say that, from what I say, nobody ever ever calls for 'Coca-Cola' any more,—that they call for 'coke' and 'dope;' well, not altogether. Some people call for 'Coca-Cola,' some express it as 'coke,' and still others use a worse and more slangy expression,—they say 'shot-in-the-arm'—'Give me a shot-in-the-arm,'—all meaning 'Coca-Cola,' or so taken by me and the soda fountains. No, the name 'Coca-Cola' is not dying out,—I guess about half the people still say 'Coca-Cola.' As I say, about half of the people call for 'Coca-Cola' and about half call for 'coke' and 'dope' and slang expressions meaning 'Coca-Cola.'***Yes, sir, we have a lot of literature in our place begging the public not to use nicknames,—to ask for 'Coca-Cola' under its own name.***Notwithstanding all that, it seems that

people are increasing in number that call it by nicknames." (Rec. 811-813).

A. M. TIMMS, a soda dispenser, Dallas, Texas:

"They only call it 'Coca-Cola' when they have a fit of absent-mindedness. They usually ask for it as 'coke' or 'dope.'***They ask for 'coke,' 'needle,' and all like that." (Rec. 753).

E. EWER, a retail druggist of Dallas, Texas:

"No, I would not say that a large part of my trade calls for 'Coca-Cola' by its own name. I would say that a majority of them call for 'coke'—more call for 'coke' than for 'Coca-Cola.'" (Rec. 808).

THOMAS LESLIE BOSWELL, one of plaintiff's numerous detectives who helped to work up this case:

"In my rounds I ran across a good many nicknames for 'Coca-Cola,' such as 'dope,' and 'coke,' 'give me a shot,' 'give me a shot-in-the-arm,' 'give me a pill,' 'a dose of lead,' 'a little cocaine,' 'coffin varnish,' 'embalming fluid,' etc." (Rec. 438).

J. B. PRENDERGAST, a retail druggist of Atlanta:

"Some of the nicknames I have heard 'Coca-Cola' called by are 'Candler's dope,' and 'Candler's cocktail,' 'a shot,' 'morning's morning,' 'eye-opener,' etc. In all these instances we served 'Coca-Cola.' (Rec. 497).

A. P. BLATSIOS, a soda dispenser, Atlanta:

"Yes, at my soda fountain I have 'Coca-Cola' called for by other names than 'Coca-Cola,' such as 'dope,' and 'Candler's booze,' or 'Candler high-ball,' and all such stuff as that." (Rec. 513).

GEORGE MOORE, a retail confectioner and "Coca-Cola" jobber, Atlanta:

"Sometimes one person calls at my place for 'caffeine,' and one or two persons 'Candler's high-ball,' and about seventy-five or eighty per cent call for 'dope.' It got so in the last couple of years pretty nearly eighty to ninety per cent. called for 'dope' instead of 'Coca-Cola'—you might say ninety per cent." (Rec. 488).

T. C. MARSHALL, a retail druggist, Atlanta:

"The other names that are used at the fountain, that I am acquainted with, in calling for 'Coca-Cola,' are 'Coca-Cola,' 'dope,' 'coke,' and 'shot-in-the arm.'" (Rec 494).

PIERRE AUGUST CAPDAU, a retail druggist of New Orleans, who has been in the business for thirty years:

"When people order 'Coca-Cola' at my fountain ***some will say 'give me a coke,' and some others will say 'give me a dope,' and still others will say 'give me some drug,'—they all use a humorous expression, or a slang expression, and it always indicates the one thing, and that is 'Coca-Cola.' (Rec. 665).

FRED SCHWARTZENBURG, manager of Katz & Besthoff's soda fountain, New Orleans:

"Oh, yes, they use the names 'coke' and 'dope,' and anything they think you will recognize they mean 'Coca-Cola.' " (Rec. 681).

R. W. BROWN, a soda fountain proprietor, New Orleans:

“Yes, sir, I have heard the names ‘coke’ and ‘dope’ used at our fountain.***They hardly ever call for ‘Coca-Cola,—they say ‘dope,’ or ‘coke,’ something like that.” (Rec 682).

J. W. ARRANT, soda dispenser, Dallas, Texas:

“Yes, sir, I am familiar with the names which customers apply to ‘Coca-Cola’ in asking for it. They call for it under the names of ‘coke,’ ‘dope,’ ‘shot’—mostly ask for ‘coke’ when they come up to the fountain.” (Rec. 748).

JAMES F. ROGERS, retail druggist, Dallas Texas:

“My observation has been during the fifteen years I have been in the business, that ‘Coca-Cola’ is called for under the names ‘coke,’ ‘dope,’ and ‘shot’—‘coke,’ however, is the most frequently called for; it is called for by fifty per cent. of our customers now.***Yes, sir, I feel that, as a druggist, I can tell pretty well a ‘dope-fiend’—one addicted to the use of opium, morphine, or some other of its bases,—when they come into my store.” (Rec. 754).

DEXTER H. HARDIN, a drug clerk and soda dispenser, Dallas, Texas:

“Our customers call for ‘Coca-Cola’ under the names ‘Coca-Cola,’ ‘dope,’ ‘coke,’ ‘shot,’ ” (Rec., 759).

O. M. BROWN, drug clerk and soda dispenser, Dallas, Texas:

“In dispensing ‘Coca-Cola’ it has been called for during the period I have been selling it, by those who use it, under the names ‘coke,’ and ‘dope,’ ‘shot-in-the arm,’ and ‘Coca-Cola.’ ” (Rec. 764).

E. B. THOMAS, confectioner, Dallas, Texas:

"I have handled and dispensed 'Coca-Cola' over the fountain about eight years. During this period my customers had been calling at the fountain for 'Coca-Cola' under at least somewhere in the neighborhood of a dozen names, I should judge. They called for 'dope,' and called for 'coke,' and they called for 'dry-town eye-opener,' and they called for a 'shot,'—things like that." (Rec. 766).

B. W. FULLER, soda dispenser, Dallas, Texas:

"My customers buying 'Coca-Cola' call for it as 'coke,' 'Coca-Cola,' 'dope,' and 'shot.'" (Rec. 833).

EDWARD T. LANGAN: now a lunch room proprietor, but formerly a drug clerk, Chicago:

"When people order 'Coca-Cola' they use various names to indicate their desires.***They ask for, oh, lots of things, like 'dope,' 'shot-in-the-arm,' and 'coke.'***In addition to 'coke' and 'dope,' I have heard customers using such expressions as 'shot-in-the-arm,' 'eye-opener,' and, oh, various names; I could not remember them all." (Rec., 894-5; 898).

PHILIP JANSEN, employed by Messrs Reed & Rogers, attorneys for plaintiff, to make the rounds of the drug stores in Chicago and ascertain the different names used, gives a good idea of the situation around Chicago in the following summary:

At 122 Madison St., the clerk said "about half of their customers ask for 'coke' when they want 'Coca-Cola.'" (Rec. 937).

At A. Arend Drug Co., 182 Madison St., "in speaking of the way people order 'Coca-Cola' the boy said, 'some ask for 'dope,' 'shot-in-the-arm,' 'poison,' 'morphine,' I asked if it was called 'coke,' and he said 'yes, some ask for it under that name, but more often as 'dope,' etc.'" (Rec. 938).

At 228 Madison St., the Greek "was not as familiar with the word 'coke' as he was with 'sniff,' 'shot-in-the-arm,' and others." (Rec. 939).

At John S. Stiles' store, 1401 Madison St., he said he "didn't think more than two or three people had said 'coke' in ordering 'Coca-Cola.' He said many people asked for 'Coca-Cola' as 'morphine' and names like that." (Rec. 943).

At W. H. Armbrecht's store, 1065 Madison St., "he said most people called 'Coca-Cola' 'coke,' or 'dope,' but he thought 'dope' a more common expression than 'coke.'" (Rec. 945).

At Buck & Rayner's store, corner State and Madison Sts., "I told him I had a bet with a man concerning the way people ordered 'Coca-Cola.' I asked him if many people asked for 'Coca-Cola' under the name of 'coke,' and he said, 'yes, a great many.' I said that the bet was that fifty per cent. of the people asked for 'coke' instead of 'Coca-Cola,' and he said probably more than fifty per cent. used the word 'coke.' He said that in his home town no one said anything but 'give me a coke' when they wanted 'Coca-Cola.' He added that a great many

called for 'a shot,' or 'dope,' when they wanted 'Coca-Cola,' and later qualified his statement concerning the number of people who said 'coke' by saying that over fifty per cent. of the customers called for 'Coca-Cola under the name of 'dope,' or 'a shot,' or 'coke.' ” (Rec. 947)

At Davidson's Chocolate Candy Store, “I asked if many people said 'coke' in ordering 'Coca-Cola,' and he said 'oh, yes, lots of them, and many others say 'shot-in-the-wrist,' or 'dope.' He did not say how many asked for 'coke,' but said that many people came in from the theatre next door and say, 'give me a little coke.' ” (Rec. 950).

At the M. C. Smucker Drug Store, 2259 Madison St., “I asked about the way people ordered 'Coca-Cola' and he said most all of their customers call for 'slow dope.' 'Very few call it coke' he said. I said I thought some of the nicknames, such as 'coke' and 'dope' may be harmful to the business, and he said 'No,' he did not think so. He spoke of what 'Coca-Cola' is, and said it is merely an extract.” (Rec. 961).

At Richards' Drug Store, Cottage Grove Ave., “I asked if many people asked for 'coke,' and he said, 'Yes, twice as many ask for that as anything else.' ” (Rec. 952).

At 3300 Cottage Grove Ave., “when asked if he found that many people asked for 'coke' in ordering 'Coca-Cola,' he said, 'Oh, a few.' He added that quite a few asked for 'dope,' but he didn't think very many said

'coke.' He said some people used to think 'Coca-Cola' had cocaine in it.***He said, also, that there was nothing like that in it, for, if there was, he would be a 'dope-fiend,' as he drank lots of it." (Rec. 954).

At 2906 Cottage Grove Avenue, "I asked if people said 'coke' in ordering 'Coca-Cola,' and he said 'Yes.' I asked if very many said 'coke,' and he said, 'Oh, quite a few, but in the South everyone says 'coke.' He said he didn't think he ever heard anyone say 'Coca-Cola' in the South. He then spoke of the lawsuit about 'Coca-Cola' containing cocaine." (Rec. 955).

At Walgreen & Thornton's, 4137 Cottage Grove Ave., "I asked for some 'coke.' The boy smiled and said, 'Shot-in-the-arm?'"***I told him that a fellow wanted to bet me that fifty per cent. of the people said 'coke,' and he said, 'Oh, not that many, you ought to take that bet.' He said, 'Fellows unknown to me come in and ask for 'Coca-Cola, saying 'give me a shot-in-the-arm.' He said that more people say 'dope' and 'shot-in-the-arm' than 'coke.' " (Rec. 956).

At 2839 Cottage Grove Ave., "I asked if many people called 'Coca-Cola' 'coke,' and he said, 'Yes, indeed.' He said about three-fourths of the people say 'coke.' (Rec. 956).

At 4256 Cottage Grove Ave., "he said, 'Oh, yes, about all of them say 'coke' " (Rec. 957).

At 4458 Cottage Grove Ave., "I asked for a little

'coke.' The clerk said, 'Will you have it in a glass or in the arm?'" (Rec. 958).

At the corner of Cottage Grove Ave., and 47th St., "I asked if they called that 'coke' very much around here. He said, 'Yes, that's about all they call it now.'" (Rec. 959).

At the southeast corner of Cottage Grove Ave. and 43rd St., "I asked if people call it 'coke' when they order it, and he said, 'Oh, yes, and we get calls for a 'shot-in-the-arm from a lot of them.'" (Rec. 959).

At 151 North Clark St., "I asked if people around here call 'Coca-Cola' 'coke.' He said, 'Oh, yes, they do everywhere.' He said they say 'coke' more in the South than they do here." (Rec. 959).

At 637 N. Clark St., "I asked if many people call it 'coke' and he said, 'Yes, lots of them.' He added, 'That is all they go by, "coke."'" (Rec., 961)

At 1310 N. Clark St., "I said, I suppose a lot of people call that 'coke.' He said, 'Yes, "coke" and "dope." ' He added, 'South of Kentucky they call it "dope."'" (Rec., 962)

At 1405 N. Clark St., "I asked if many people call it 'coke.' He said, they say "shot-in-the-arm" around here.' He added that in the south they all say, 'Give me a glass of dope.'" (Rec., 962)

At 65 Monroe St., "I asked one of the clerks, a big

good-looking Irishman, if many people call 'Coca-Cola' 'coke.' He said, 'Yes, a great many.' I told him that a man bet me that fifty per cent. of the people say 'coke.' He said, 'Yes, easily that many.' He added that nine out of ten say 'coke,' or used to." (Rec., 964)

In summing up, the witness said:

"In many places the expression 'give me a shot-in-the-arm,' or 'give me a shot-in-the-wrist,' or 'give me a shot,' seems to be very prevalent around Chicago. *** At times they ask for it as 'cocaine' and 'morphine.' " (Rec., 965)

LUKE POGUE, proprietor of a soft drink stand, Chattanooga, Tenn., (defendants' witness):

"Customers ask for a 'dope,' or a 'shot,' or a 'sniff,' or different things." (Rec., 1060).

It was to this widespread delusion of the public as to the essential ingredients of plaintiff's so-called "Coca-Cola" that plaintiff referred in "The Truth About Coca-Cola," when it said:

"Ignorance of the true properties of 'Coca-Cola' has caused some people to deny themselves a beverage that they like, and that is not only wholesome by physically beneficial. *** You have heard people argue that 'Coca-Cola' must contain morphine, whiskey, or some other injurious drug, because it relieves headache. Well, there are more ways of relieving tired, weary nerves than by benumbing them with cocaine, morphine, bromide, whiskey, or coal-tar remedies. 'Tea, coffee and 'Coca-Cola' relieve headache by refreshing the nerves and not by deadening them. *** There is

no necessity to argue, guess or conjecture what 'Coca-Cola' contains, or does not contain. It has been analyzed by chemists of the national, city and State Governments, as well as by the professors of chemistry in the leading universities, colleges and polytechnic schools. They all find that it does not contain cocaine, whiskey, morphine, opium, bromide, or any narcotic drug."

And it was because of the popular impression that plaintiff's product is still "made from the drugs coca and cola," and must, therefore, still "contain the dangerous substance cocaine," and must still be a habit-forming drink, just as it was originally, that plaintiff felt called upon to emit the following panygeric on "Habit" in "The 'Truth About Coca-Cola':

"Habit.—Good habits are more easily acquired than bad ones. Nature herself leads us into good habits, like the bread and butter habit, the water habit, the sleeping habit,—habits that come from a physical necessity. Nature makes habits that are good. She calls for bread and butter. We get the bread and butter habit. She calls for sweets, we get the sugar and candy habit. What does habit amount to? Not a single solitary thing. *** Now let us repeat so that you will see plainly just exactly what habit is and the part that nature plays in it. Nature calls for bread and butter, and we get the bread and butter habit; she calls for sweets, and we get the sugar and candy habit; she calls for something to aid her in her fight against over-charged nerves, and we get what is called the 'Coca-Cola Habit,' because that gives the sweetness, the nerve-quieting qualities, etc. *** You must get rid

of the impression, because a thing is popular it is anything but wholesome. But leave off drinking 'Coca-Cola' any time you've a mind to. You will have no craving for it. You may miss its deliciousness as you miss your hot biscuits in the morning; but you won't feel any other discomfort. You can't, because caffeine does not create the 'drug habit.' *** If liking 'Coca-Cola,' then, is a habit, think of the thousands upon thousands suffering with like habits,—candy fiends,—butter-milk drunkards,—slaves to water. When any one talks to you about the 'Coca-Cola Habit,' laugh at him. *** If you will consider this seriously, and read and read again our opening paragraph, you will find that this answers absolutely and without equivocation any and all questions as to 'Coca-Cola' containing any deleterious, injurious, or habit-forming drugs. Read the above again,—it is your assurance of the healthfulness of 'Coca-Cola.' No one can get around it."

If it be insisted that, by the issuance of this pamphlet and others to the same effect, plaintiff has done all in its power to off-set the false impression created by the name "Coca-Cola," and the pictures of coca leaves and cola nuts, we cut under that by saying that "it had no right to do that which rendered such explanations necessary, and which also rendered them futile."

ANOTHER PHASE OF PLAINTIFF'S FRAUD.

Another phase of the same question arises from plaintiff's insistence that Dr. Pemberton invented the compound of which he is claimed to have been the originator, and gave to his invention the name "Coca-Cola," and, further, that the formula or process of manufac-

ture was preserved as a secret, and that the article was put forth as a secret, proprietary preparation. If the contention is true, then the name "Coca-Cola" was undoubtedly the descriptive name of this secret, proprietary invention, and the sale of a different article, not made in accordance with the secret formula, would be a fraud on the public. As plaintiff's present product is not the article which Dr. Pemberton is said to have invented, and is not made in accordance with Dr. Pemberton's alleged secret formula, the sale of it as "Coca-Cola" is a misrepresentation and fraud.

GROUND OF DISTRICT COURT'S ACTION.

In passing upon the question of unclean hands the District Court was controlled by the decision in *Nashville Syrup Co. v. Coca-Cola*, 215 Fed., 527 ("C. C. A."-6), and, perhaps, also by the companion case of *U. S. v. 40 Barrels and 20 Kegs of "Coca-Cola,"* 215 Fed., 535 ("C. C. A."-6) decided at the same time. In his opinion Judge Sawtelle said:

"It is also contended in the answer that the name 'Coca-Cola' was deceptive as a trade-mark, and for that reason was fraudulent, and was but a descriptive name of a product which the plaintiff does not now produce. (Rec., 231) *** It is insisted by the defendants that the words 'Coca-Cola' are a mere description of a product, and that it does not describe the product of plaintiff, and consequently does not constitute a valid trade-mark. This contention was considered in case of *Coca-Cola Co. v. Nashville Syrup Co.*, 215 Fed., 527, and was decided adversely to such contention. I think that

the decision is decisive of the question." (Rec., 237-8).

That case was tried on final hearing in the court below, and in the Circuit Court of Appeals, simply upon the affidavits submitted on a previous application for a preliminary injunction. (200 Fed., 158) The case was decided on the same reasoning as in *U. S. v. Forty Barrels, etc., supra*, and the decision in the latter case was overruled by the Supreme Court. (241 U. S., 265, 60 L. Ed., 995).

It is respectfully insisted, therefore, that the District Court erred in failing to find that plaintiff has come into court with unclean hands, and in failing to dismiss the bill for that reason.

PLAINTIFF'S PRODUCT MISBRANDED

Section 8 of the Food & Drugs Act of June 30th., 1906 (Chap. 3915, 34 Stat. L., 769; 1909 Supp. Stat. Ann., 139-140) provides:

"The term 'misbranded' as used herein shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. *** That for the purposes of this Act an article shall also be deemed to be misbranded: *** In case of food: First, if it be an imitation of, or offered for sale under the

distinctive name of another article. Second, if it be labeled or branded so as to mislead or deceive the purchaser. *** Fourth, if the package containing it, or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular."

In *U. S. v. 40 Barrels and 20 Kegs of "Coca-Cola,"* 241 U. S., 265; 60 L. Ed., 995, 1004, the Supreme Court said, with respect to a charge of misbranding brought by the Government against plaintiff's product (Mr. Justice Hughes):

"*Second.*—As to '*misbranding.*' In the second count it was charged that the expression 'Coca-Cola' represented the presence in the product of the substances coca and cola, and that it contained 'no coca and little if any cola.' So far as 'cola' was concerned, the charge was vague and indefinite, and this seems to have been conceded by the government at the beginning of the trial. With respect to 'coca' there was evidence on the part of the government tending to show that there was nothing in the product obtained from the leaves of the coca plant, while on behalf of the claimant it was testified that the material called 'Merchandise No. 5' (one of the ingredients) was obtained from both coca leaves and cola nuts. It was assumed on the motion for a peremptory instruction that there might be a disputed question of fact as to whether the use of the word 'coca' is to be regarded 'intrinsically and originally' as stating or suggesting the presence of 'some material element or quality' derived from coca leaves, and it was also assumed that the evidence might be deemed to be conflicting with respect to

the question whether the product actually contained anything so derived. *191 Fed.*, 438, 439. But these issues of fact were not considered to be material. On this branch of the case, the claimant succeeded upon the ground that its article was within the protection of the proviso in section 8 as one known 'under its own distinctive name.' *132 C. C. A.*, 47, *215 Fed.*, 544.

"Section 8, in its 4th. specification as to 'food,' provides that the article shall be deemed to be 'misbranded' 'if the package containing it, or its label, shall bear any statement, design or device regarding the ingredients or substances contained therein, which shall be false or misleading in any particular.' Then follows the proviso in question that an article not containing any added poisonous or deleterious ingredients 'shall not be deemed to be *** misbranded' in the case of 'mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article,' if the name is accompanied with a statement of the place where the article has been produced.

"A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either 'misleading' or 'false' as it is in fact distinctive. But unless the name is truly

distinctive, the immunity cannot be enjoyed; it does not extend to a case where an article is offered for sale 'under the distinctive name of another article.' Thus, that which is not coffee, or is an imitation of coffee, cannot be sold as coffee; and it would not be protected by being called 'X's Coffee.' Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of 'Y's' Lemon Extract.' The name so used is not 'distinctive,' as it does not appropriately distinguish the product; it is an effort to trade under the name of an article of a different sort. So, with respect to 'mixtures or compounds,' we think that the term 'another article' in the proviso embraces different compounds from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound cannot secure protection as a 'distinctive name.'

"A 'distinctive name' may also, of course, be purely arbitrary or fanciful, and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive.

"If, in the present case, the article had been named 'Coca' and it were found that the name was actually descriptive in the sense that it fairly implied that the article was derived from the leaves of the coca plant, it could not be said that this was 'its own distinctive name' if in fact it contained nothing so derived. The name, if thus descriptive, would import a different product from the one to which it was actually affixed. And, in the case supposed, the name would not become the 'distinctive name' of a product without any coca ingredient un-

less in popular acceptance it came to be regarded as identifying a product known to be of that character. It would follow that the mere sale of the product under the name 'Coca' and the fact that this was used as a trade designation of the product, would not suffice to show that it had ceased to have its original significance if it did not appear that it had become known to the public that the article contained nothing derived from coca. Until such knowledge could be attributed to the public, the name would naturally continue to be descriptive in the original sense. Nor would it be controlling that at the time of the adoption of the name the coca plant was known only to foreigners and scientists; for, if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did not know or who took pains to inform themselves of its meaning. Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation. The same conclusion would be reached, if the single name 'Cola' had been used as the name of the product, and it were found that in fact the name imported that the product was obtained from the cola-nut. The name would not be the distinctive name of a product not so derived until in usage it achieved that secondary significance.

"We are thus brought to the question whether, if the names coca and cola were respectively descriptive, as the government contends, a combination of the two names constituted a 'distinctive name' within the protection of the proviso in case either of the described ingredients was absent. It is said that

'coca' indicates one article, and 'cola' another, but that the two names together did not constitute the distinctive name of any other substance or combination of substances. The contention leads far. To take the illustration suggested in argument, it would permit a manufacturer, who could not use the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as 'Chocolate-Vanilla,' although it was destitute of either or both, provided the combined name had not been previously used. We think that the contention misses the point in proviso. A mixture or compound may have a name descriptive of its ingredients, or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients, are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it 'its own distinctive name,'—which distinguishes it from other compounds,—but it gives it the name of a different compound. That, in our judgment, is not protected by the proviso, unless the name had achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning.

"In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always

insisted, and now insists, that its product contains both. But if the name was found to be descriptive, there was clearly a conflict of the evidence with respect to the presence of any coca ingredient. We conclude that the court erred in directing a verdict on the second count. The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion."

The facts discussed in the preceeding section clearly bring plaintiff's product within this decision.

PLAINTIFF'S PRODUCT ADULTERATED.

Section 7 of the Food & Drugs Act provides:

"That for the purposes of this Act an article shall be deemed to be adulterated: *** In the case of food: *** Third.—If any valuable constituent of the article has been wholly or in part abstracted."

That the drug coca, and all the valuable constituents thereof, have been abstracted from plaintiff's product, has already been shown. That coca was a valuable constituent of the article is made originally cannot be denied. One of the leading inducements to its purchase was the representation that it contained the valuable "tonic and nerve stimulant properties of the wonderful coca plant." Its efficacy as a stimulant was largely dependent upon that drug. The public still believe the drug is present in the preparation, and buy it under that belief. Its abstraction, therefore, is undoubtedly an adulteration.

So far as the drug cola is concerned, never having been a constituent at any time, it may be that it could not be said to have been *abstracted* from the product. But if it ever was present, then it has certainly been abstracted, for it is not present now, as already shown. Plaintiff cannot deny that, if present, it was a valuable constituent, because it advertised its product as possessing special merit on account of the fact that it contained "the crude African cola nut."

NO TRADE-MARK INFRINGEMENT.

THE WORDS "COCA-COLA" ARE NOT A TRADE-MARK.

In *Diederich v. W. Schneider Wholesale Wine & Liquor Co.*, 195 Fed., 36 ("C. C. A." 8) it was said:

"It is a self evident proposition that what is not and cannot be a trade-mark, is not and cannot be infringed as a trade-mark."

It is plain from the undisputed evidence in this case that the words "Coca-Cola" are not, and cannot be, a trade-mark, and, therefore, cannot be infringed as a trade-mark.

Admittedly the words "Coca" and "Cola" are both purely descriptive words. They are the generic names of two well-known drugs that have been extensively dealt in in this country since long prior to 1886, and both were in general use for a number of years prior to that year as the names of numerous preparations containing one or the other, or both, of those drugs.¹ Neither

¹See, ante, "Plaintiff's Unclean Hands."

of them, therefore, was the proper subject of a trade-mark for a preparation containing those drugs when plaintiff's predecessors adopted the two words as the name of their remedy in May 1886.

Caswell v. Davis, 58 N. Y., 223; 17 Am. Rep., 233, 241:

“There is no principle more firmly settled in the law of trade-marks, than that words or phrases which have been in common use and which indicate the character, kind, quality, and composition of the thing, may not be appropriated by any one to his exclusive use.”

Among the numerous cases to the same effect, are: *Canal Co. v. Clark*, 80 U. S., 311, 20 L. Ed., 581; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S., 51, 25 L. Ed., 993; *Goodyear India Rubber Glove Mfg. Co. v. India Rubber Co.*, 128 U. S., 598, 32 L. Ed., 535; *Stachelberg v. Ponce*, 128 U. S., 686, 32 L. Ed., 569; *Corbon v. Gould*, 133 U. S., 308, 33 L. Ed., 611; *Lawrence Mfg. Co. v. Tenn. Mfg. Co.*, 138 U. S., 537, 34 L. Ed., 997; *Brown Chemical Co. v. Meyer*, 139 U. S., 540, 35 L. Ed., 247; *Coats v. Merrick Thread Co.*, 149 U. S., 568, 37 L. Ed., 847; *Columbia Mill Co. v. Alcorn*, 150 U. S., 464, 37 L. Ed., 1144; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S., 169, 41 L. Ed., 118; *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S., 665, 45 L. Ed., 365; *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S., 1, 46 L. Ed., 49; *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S., 446, 55 L. Ed., 536; *Kellogg Toasted Corn Flakes Co. v. Quaker Oats*

Co., 235 Fed., 657; *Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed., 965, 55 C. C. A., 459; *Marvel Co. v. Pearl*, 133 Fed., 160, 66 C. C. A., 226; *Brennan v. Ewing-Byrd-Thayer Dry Goods Co.*, 108 Fed., 624, 47 C. C. A., 532; *American Wash Board Co. v. Saginaw Mfg. Co.*, 103 Fed., 281, 43 C. C. A., 233; *Rice-Dix Dry Goods Co. v. J. A. Scriven Co.*, 165 Fed., 639, 91 C. C. A., 475; *Searle & Hereth Co. v. Warner*, 112 Fed., 674, 50 C. C. A., 321, *affirmed* 191 U. S., 195, 48 L. Ed., 145, 24 Sup. Ct. Rep., 79; *Bulte v. Inglehart Bros.*, 137 Fed., 492 (C. C. A."-8); *U. S. Tobacco Co. v. McGreenary*, 144 Fed., 531, *affirmed*, 144 Fed., 1022; *America Tobacco Co. v. Globe Tobacco Co.*, 193 Fed., 1016; *Spiegel v. Zuckerman*, 175 Fed., 978; *Galena Signal Oil Co. v. W. P. Fuller & Co.*, 142 Fed., 1002; 38 CYC., 699; 28 Am. & Eng. Enc. of Law., 394.

It is said, however, that, while it is undoubtedly true that the words "Coca" and "Cola" are descriptive, and that both were generic and in general use in the trade when plaintiff's predecessors adopted and began to use them, nevertheless the words had always theretofore been used separately and apart, and had never before been coupled together, in the combination "Coca-Cola," until plaintiff's predecessors combined them and used them in combination; and that, therefore, while neither element of the combination could have been appropriated separately, yet the combination as a whole, having never before been used, was subject to exclusive appropriation as a trade-mark.

But in the first place, it is not true that plaintiff's predecessors were the first to couple the words together and use them in combination. Benjamin Kent, of Patterson, N. J., used the combination, "Coca-Cola," as the name of his remedy for a year or more before plaintiff's predecessors even began to make the article to which they subsequently applied the name "Coca-Cola," and he continued to use that combination until at least 1893 (*Defendant's Exhibit 68 and 70*).

In the second place, it could make no difference whether plaintiff's predecessors were the first to use the words in combination or not. The mere coupling together of two essentially descriptive words, each of which describes a well known drug represented to be present in the article to which the words, as thus combined, are applied, does not make the combination any the less descriptive; it makes it, rather, still more specifically descriptive, because the two words together state, with more particularity than either of them could separately precisely what the article contains.

28 Am. & Eng. Enc. of Law, 375:

"Words merely descriptive of the ingredients of which the article is composed do not constitute a valid trade-mark. Upon this ground the name of an article consisting of a compound of the names of its ingredients has often been refused protection, though it seems that these decisions might have proceeded upon the broader ground that the generic name of an article cannot be a trade-mark."

The law, as thus stated, has been applied in numerous

cases. In each of the cases set out below, the combination of words placed in parenthesis after the citation was claimed by the plaintiff as a new and original combination which had never before been used, but the courts, in each instance, held that the combination was invalid as a trade-mark, because it consisted merely of words which were descriptive when used separately, which were still more so when used in combination.

Caswell v. Davis, 58 N. Y., 223, 17 Am. Rep., 223, 242 ("Ferro-Phosphated Elixir of Calisaya Bark," as applied to a preparation consisting of iron, phosphorus, and elixir of calisaya bark.)

Pennsylvania Rubber Co. v. Dreadnaught Tire & R. Co., 225 Fed., 138; *affirmed*, 229 Fed., 560 ("C. C. A."-3) ("Vacuum Cup" and "Vacuum Tread," as applied to automobile tires the treads of which consist of four or five circular rows of cup-shaped projections, and as to which it was advertised that the suction of the vacuum would prevent skidding.)

Van Zile v. Norub Mfg. Co., 228 Fed., 829, ("Norub" and "Nodust," as applied to powders used as a laundry germicide and cleanser.)

Chapin-Sacks Mfg. Co. v. Hendler Creamery Co., 231 Fed., 550 ("The Velvet Kind," as applied to ice cream.)

Rubber & Celluloid Harness Trimming Co. v. F. W. DeVoe & C. T. Reynolds Co., 233 Fed., 150 ("Rubber-

set," as applied to brushes the bristles of which are set in rubber.)

Computing Scales Co. v. Standard Computing Scale Co. 118 Fed., 965, 55 C. C. A., 459 ("Standard" and "Computing," as applied to the standard type of computing scales.)

Brennan v. Emery-Bird-Thayer Dry Goods Co., 108 Fed., 624, 47 C. C. A., 532 ("Steel Shod," as applied to boots and shoes whose soles are studded with steel nails to render them more durable.)

Rice-Dix Dry Goods Co. v. J. A. Scriven Co., 165 Fed., 639, 91 C. C. A., 475, (8th. Cir.) ("Elastic Seam," as applied to drawers having a strip of elastic material inserted in the seam.)

Newcomer & Lewis v. Scriven Co., 168 Fed., 621, 94 C. C. A., 77 (6th. Cir.) ("Elastic Seam," as applied to drawers having a strip of elastic material in the seams.)

Scriven v. North, 124 Fed., 894; *affirmed*, 134 Fed., 366, 67 C. C. A., 348; ("Elastic Seam," as applied to drawers having a strip of elastic material inserted in the seams.)

Rushmore v. Manhattan Screw & Stamping Works, 163 Fed., 939, 90 C. C. A., 299 (2nd. Cir.) ("Flare Front," as applied to automobile lamps the shells of which flare in front to enclose a large glass.)

Paris Medicine Co. v. W. H. Hill Co., 102 Fed., 150

("C. C. A."-6) ("Bromo-Quinine," as applied to a medicine composed of bromine and quinine.)

Marvel Co. v. Pearl, 133 Fed., 160; 66 C. C. A., 226 (2nd. Cir.) ("Whirling Spray," as applied to a syringe which throws a whirling spray of water.)

John T. Dyer Quarry Co. v. Schuylkill Stone Co., 185 Fed., 557. ("Birdsboro Trap Rock," as applied to trap rock quarried at Birdsboro, Pa.)

Wm. Wrigley Jr. & Co. v. Grove, et al., 161 Fed., 885; 183 Fed., 99 ("C. C. A."-2) ("Spearmint," as applied to chewing gum having the flavor of spearmint.)

Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed., 73, 101 C. C. A., 565 (2nd. Cir.) ("Keepclean," as applied to tooth brushes.)

Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co., 235 Fed., 657; ("C. C. A."-6) ("Toasted Corn Flakes," as applied to toasted flakes of corn.)

Brickman Gall Cure Co. v. Karns, et al., 126 Fed., 573. ("Gall Cure," as applied to a cure for gall.)

Ault & Wiborg Co. v. Cheshire, 191 Fed., 741 ("No Wash Up," as applied to a preparation for use on printing rollers and lithographing plates to obviate the necessity of washing them.)

Greene, Tweed & Co. v. Manufacturers' Belt Hook

Co., 158 Fed., 640 ("Stud Belt Fastener," as applied to an article of that description.)

Devlin v. McLeod, 135 Fed., 164 ("Toothache Gum," as applied to a gum for toothache.)

Searle & Hereth Co. v. Warner, 112 Fed., 674, 50 C. C. A., 321 ("Pancreopepsine," as applied to a preparation of pancreas and pepsin.)

Draper v. Skerritt, 116 Fed., 206 ("French Tissue," as applied to a thin paper dressing for corns, originating in France.)

California Fig Syrup Co. v. Frederick Stearns & Co., 67 Fed., 1008; *affirmed*, 73 Fed., 812, 20 C. C. A., 22, 33 L. R. A., 56 ("Syrup of Figs," as applied to a syrup containing the juice of figs.)

Air-Brush Co. v. Thayer, 84 Fed., 640 ("Air Brush," as applied to an air brush atomizer for distributing paint.)

Colgan v. Danheiser, 35 Fed., 150 ("Taffy-Tolou," as applied to chewing gum.)

Brown Chemical Co. v. Frederick Stearns Co., 37 Fed., 360 ("Iron Bitters," as applied to a tonic containing iron and bitters.)

Ginter v. Kinney Tobacco Co., 12 Fed., 782 ("Straight Cut," as applied to cigarettes in which the tobacco has been so cut and treated at the time of the cutting as to

preserve the fibres long, even, straight, and parellel when prepared for sale and use.)

Clothworthy v. Schepp, 42 Fed., 62 ("Rose," "Vanilla," and "Puddine," as applied to a pudding flavored with rose and vanilla.)

L. H. Harris Drug Co. v. Stuckey, 46 Fed., 624 ("Cramp Cure," as applied to a remedy of that character.)

Carbolic Soap Co. v. Thompson, 25 Fed., 625 ("Cresylic Ointment," as applied to an ointment composed of cresylic acid.)

Lamont v. Leedy, 88 Fed., 72 ("Crystalized Eggs," as applied to egg meat preserved by a secret process and put up in cans and bottles.)

Indurated Fibre Co. v. Amoskeag Indurated Fibre-Wear Co., 37 Fed., 695 ("Indurated Fibre," as applied to wares made of wood-plup, which has been condensed, and subjected to baths in linseed oil and resin, and baked, thus hardening the wood.)

Hoyt v. J. T. Lovett Co., 71 Fed., 173, 17 C. C. A., 652 ("Green Mountain Grapes," as applied to grapes originally obtained from the Green Mountains.)

Evans v. Von Laer, 32 Fed., 153 "Montserrat Lime & Fruit Juice," as applied to lime juice imported from the Island of Montserrat, in the West Indies.)

Humphrey Homeopathic Medicine Co. v. Hilton, 60 Fed., 756 (“No. 1 Fever,” “No. 5 Dysentery,” “No. 10 Cholera,” etc., as applied to remedies for those ailments.)

Hostetter v. Fries, 17 Fed., 620 (“Hostetter’s Stomach Bitters,” as applied to the stomach bitters originated by Dr. Hostetter.)

Rumford Chemical Co. v. Muth, 35 Fed., 524 (“Acid Phosphate,” as applied to a medicinal preparation containing acid phosphate.)

Canal Co. v. Clark, 80 U. S., 311, 20 L. Ed., 581 (“Lackawana Coal,” as applied to coal mined in the Lackawana district.)

Indeed, the combination “Coca-Cola” has been specifically adjudged to be descriptive.

In *Coca-Cola Co. v. Deacon Brown Bottling Co.*, 200 Fed., 105, Judge Grubb said:

“The right of complainant to use the words ‘Coca-Cola’ as a trade-mark under the Act of 1881 is doubtful; at least, in view of the fact that the words are admittedly suggestive, and probably merely descriptive of the constituents of the beverage, and not subject to appropriation as a trade-mark.”

In *Coca-Cola Co. v. Nashville Syrup Co.*, 200 Fed., 154, Judge Sanford said:

“The question whether the combined word ‘Coca-Cola’ is so descriptive of the constituents of the beverage that it was not originally subject to appropriation as a trade-mark, is one of such doubt

that if this were the only question in the case, the complainant would not, I think, be entitled to a preliminary injunction."

In *U. S. v. 40 Barrels and 20 Kegs of "Coca-Cola,"* 241 U. S., 265, 60 L. Ed., 995, 1004, 1006, Mr. Justice Hughes, in delivering the opinion, said:

"In the second count it was charged that the expression 'Coca-Cola' represented the presence in the product of the substances coca and cola. *** We are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged."

Indeed, by registering the words as a descriptive term under the Ten-Year Clause of Sec. 5, of the Trade-Mark Act of 1905, plaintiff has estopped itself to deny that the words are descriptive. *Joseph Lay Co. v. Indianapolis Broom Mfg. Co.*, 40 App. Cas. (D. C.) 36. The admission, in the pamphlet entitled "The Truth About Coca-Cola" (*Plaintiff's Exhibit 91*), that, "By many it had been inferred, presumably from the name, that 'Coca-Cola' is made from the drugs coca and cola," renders further discussion unnecessary.

Not only are the words "Coca-Cola" a purely descriptive term, descriptive of a compound with coca and cola ingredients, but they were adopted for the purpose of describing what it was intended for the public to believe were the lading ingredients of the article, and were used for that purpose for many years. The name originally adopted was "Coca-Cola Syrup & Extract." (*Defen-*

dant's Exhibit 23). Asa G. Candler said that they called it "Coca-Cola" because those were its leading ingredients (*Rucker Rec.*, 259), and F. M. Robinson said that the syrup was given that name because it contained "coca" and "cola." (*Rec.*, 354). Dr. Pemberton advertised on his labels (*Defendant's Exhibit 23*) that the preparation contained the valuable "tonic and nerve stimulant properties of the coca plant and cola nuts," and Asa G. Candler advertised on his letter-heads that it contained "the tonic properties of the wonderful coca plant and the famous cola nut." (*Plaintiff's Exhibit 76*). It needs no citation of authority to sustain the proposition that words thus used to denote ingredients are not trade-marks. *Canal Co. v. Clark, supra*.

In addition to this, it was alleged in the bill (*Rec.*, 5, 6) that the article to which Dr. Pemberton applied the name "Coca-Cola" was both an invention, invented by him, and a secret proprietary article made by a secret formula or process. If the allegation were true, that would be but an additional reason why the words cannot be a trade mark-

LaClanche Battery Co. v. Western Electric Co., 23 Fed., 276:

"When an article is made which was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all who deal in the article have a right to designate it by the name by which alone it is recognizable."

Hostetter v. Fries, 17 Fed., 620:

“When a new article is made, a name must be given to it, and this name becomes by common acceptance the appropriate descriptive name by which it is known, and, therefore, becomes public property, so that all who have the right to manufacture and sell the preparation have the right to designate and sell it by the name by which alone it is known, provided care is observed to sell the preparation as the manufacture of the seller, and not the preparation made by another.”

In *Cellular Clothing Co. v. Maxton & Murray*, L. R. (1899) A. C., 326; 68 L. J. P. C., 72; 80 L. T. Rep., (N. S.) 809, 16 R. P. C., 397, 409, Lord Davey remarked:

“Of course, My Lords, that is a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then, during the term of the patent, he has, of course, a legal monopoly; but when the patent expires, all the world may make the article, and, if they make the article, they may say that they are making the article, and, for this purpose, use the name which the patenee has attached to it during the time when he had the legal monopoly of the manufacture. But, My Lords, the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world and gives it a name descriptive of the article,—all the world may make the article, and all the world may tell the public what the article is they make, and, for that purpose,

they may, *prima facie*, use the name by which the article is known in the market.”

28 *Am. & Eng. Ency. of Law*, 378, 380, 382:

“Obviously, the generic name of an article cannot be exclusively appropriated as a trade-mark for that article, because such name is essentially descriptive.

*** Where a patented article becomes known by a particular name, although an arbitrary one suitable for use as a trade-mark, or the name of the inventor, such name becomes *publici juris* upon the expiration of the patent, and any one who makes and sells the patented article may call it by that name, because such name is generic and descriptive. *** The name of a secret preparation is governed by the same rule as that of a patented article. *** If the secret is discovered, another may make and sell the same article under the same name.”

The registration of the words “Coca-Cola” which plaintiff secured in 1893, under the Trade-Mark Act of March 3rd., 1881, added nothing to the validity of those words as a trade-mark; indeed, that registration was void, for the Act did not authorize the registration of descriptive words.

Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 41 L. Ed., 365.

L. H. Harris Drug Co. v. Stuckey, 46 Fed., 624.

The foregoing propositions are not seriously disputed. Plaintiff bases its claim to a trade-mark in the words “Coca-Cola” almost entirely upon the registration which it obtained October 31st., 1905, under the 10 Year Clause

of Sec. 5 of the Trade-Mark Act of Feb. 20th., 1905. The pertinent parts of that section are as follows:

“That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark.

*** *Provided*, that no mark which consists merely *** in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods *** shall be registered under the terms of this Act: *** *Provided, further*, that nothing herein shall prevent the registration of any mark used by the applicant of his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations, or among the several states, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this Act.”

It is contended that plaintiff enjoyed the exclusive use of the words “Coca-Cola” during the prescribed ten year period, and that, having perfected, by registration, the inchoate rights thus acquired, its claim to a valid trade-mark in those words is unassailable.

In the case of *In Re Hoff*, 33 App. Cas. (D. C.), 233, the Court of Appeals for the District of Columbia held that the burden of proof is on the plaintiff to show actual exclusive use by clear and convincing evidence. But far from sustaining this burden of proof by any evidence whatever, plaintiff has itself proved that it did not have the required exclusive use. It is admitted that both the

words "Coca" and "Cola" were in general use during the ten-year period as trade names for a number of preparations similar in all respects to plaintiff's and it is shown without dispute that both were in common, every-day use in the trade as the generic names of the drugs coca and cola and of pharmaceutical preparations thereof,—during the whole of that period. (*Dr. H. C. Fuller, Rec.*, 2374; *J. C. Mayfield, Rec.*, 1601).

"Wine of Coca,"—the wine tonic,—was manufactured by druggists everywhere, and sold throughout the country under that name until nine or ten years ago. (*C. G. Peters, Rec.*, 956.) "Wine of Coca" was also made into a soda fountain syrup similar to plaintiff's product, and manufactured in Atlanta by the Wine of Coca Company, a corporation, and sold in that form and under that name. (*J. C. Mayfield, Rec.*, 1592-3; *Lee Hagan, Rec.*, 1292; *F. C. Dorider, Rec.*, 1195; *Geo. R. Edmondson, Rec.*, 1301; *S. T. Mayfield, Rec.*, 1468; *Henry Boerger, Rec.*, 969) from 1893 (*J. C. Mayfield, Rec.*, 1592-3; *Lee Hagan, Rec.*, 1292; *S. T. Mayfield, Rec.*, 1468) to at least 1905 (*Boerger, Rec.*, 969; *Dorider, Rec.*, 1195; *Edmondson, Rec.*, 1301) and was manufactured and sold by the Boston branch of the Wine of Coca Company for several years, beginning in 1898 (*J. C. Mayfield, Rec.*, 1893) "My-Coca" and "Coca-Nola," both similar in all respects to plaintiff's product, have been marketed under those names since about 1900 (*C. N. Baker, Rec.*, 1407; *Charles Kingsburry, Rec.*, 467). A similar preparation, marketed under the single name, "Coca," was sold at Louisville, Ky., (*G. G. DeSouche, Rec.*, 1349), and, in

fact, there were "a number of "*Coca's*," with a little difference in the latter part of the name,—instead of making it 'Coca-Cola,' they would make it 'Coca'—something." (*DeSouche, Rec.*, 1349).

It is admitted that the defendants' predecessor, J. C. Mayfield, and his successor, the J. C. Mayfield Mfg. Co., continuously manufactured and sold "Celery-Cola,"—a beverage similar to plaintiff's,—under the name "Celery-Cola," from 1893 to at least 1909. As a matter of fact, the J. C. Mayfield Mfg. Co. is still doing so. "Cola-Ade," another beverage similar to plaintiff's, was manufactured by Wyley, in Atlanta, and enjoyed quite an extensive sale in several of the Southern States during the ten-year period. (*William M. Sidebottom, Rec.*, 1162; *F. C. Dorider, Rec.*, 1195). "Afri-Cola," still another product similar to plaintiff's, has been manufactured by Hagan & Dodd, in Atlanta, and sold under that name, since 1899. (*Lee Hagan, Rec.*, 1292). This is formally admitted of record. (*Rec.*, 1296) "Star-Cola," still another drink similar to plaintiff's, has been manufactured by Diehl & Lord, at Nashville, Tenn., and sold under that name, since 1900 (*Adam Diehl, Rec.*, 1083-5.) Diehl says that there were eight or ten or fifteen "cola" products at that time,—meaning thereby drinks similar to plaintiff's and having names ending in "Cola" (*Rec.*, 1085). "Orin-Cola" has been manufactured in St. Louis, Mo., by Norville N. Leaver, and sold under that name, since March 1st., 1904 (*Norville N. Leaver, Rec.*, 2306; *John H. Bohne, Rec.*, 2045).

Plaintiff attempts to avoid the effect of this evidence by urging that, because the words "Coca" and "Cola" were not used together, in the combination "Coca-Cola," by any one other than it during the ten-year period, therefore it had the exclusive use of the combination as a whole, notwithstanding the fact that it did not have the exclusive use of either of the elements of that combination. But the mere fact that plaintiff may have been the only one to use, coupled together in combination, words which, separately and in combination with other words, were in general use as applied to merchandise of the same descriptive properties during the whole of the ten-year period, does not amount to that exclusive use which is required by the Ten-Year Clause. Suppose plaintiff had, in the year 1894, coupled together the words chocolate and vanilla, in the combination "Chocolate-Vanilla," and had been the only one to use those words in that combination until October 31st., 1905, would that have given it the right to claim that it had the exclusive use of those words during the ten-year period, so as to enable it to register them under the Ten-Year Clause and exclude others from using them, or either of them, as applied to beverages containing chocolate and vanilla, or both? The Court of Appeals of the District of Columbia has held otherwise.

In the case of *In Re Meyers Brothers Coffee & Spice Co.*, 32 App. Cas. (D. C.), 277, Mr. Justice Van Orsdel, in delivering the opinion of the court, said:

"Neither of the words used in this combination would, standing alone, be entitled to registration as a trade-mark for coffee. *** This court has held

that a resisterable mark cannot be made by combining two non-registerable words.”

In *Kentucky Distilleries & Warehouse Co. v. Old Lexington Distilling Co.*, 32 App. Cas. (D. C.), 223, the applicant sought to register the words “Old Lexington Club” under the Ten-Year Clause, as a trade-mark for whiskey, claiming to have had the exclusive use of that combination of words, although not the exclusive use of the separate elements of the combination, during the ten-year period. The court held that the word “Lexington” was geographical, and had been used by others during the ten-year period as descriptive of whiskeys distilled at Lexington, and that the word “Club” had been used in 56 different combinations as a brand for whiskey during the same period; and consequently refused registration of the combination on the ground that the applicant had not had the exclusive use of the words forming the combination.

38 *CYC.*, 857-8:

“A combination of non-registerable words is not entitled to registration.”

The court below based its decision that the words “Coca-Cola” constitute a valid trade-mark upon the opinion of Judge Grubb in the case of *Coca-Cola Co. v. Deacon Brown Bottling Co.*, 200 Fed., 105, and, perhaps, also, upon the decision in *Nashville Syrup Co. v. Coca Cola Co.*, 215 Fed., 527. In passing upon this question Judge Sawtelle said:

“The question of the validity of the trade-mark ‘Coca-Cola’ and the right of plaintiff to its exclusive

use since its registration under the Act of Congress of Feb. 20th., 1905, would seem to be placed beyond the pale of contention by the case of *Coca-Cola Co. v. Deacon Brown Bottling Co.*, 200 Fed., 105." (Rec., 238).

The case cited was just an application for a preliminary injunction, and was tried simply on *affidavits*. *Nashville Syrup Co. v. Coca-Cola Co.*, *supra*, was likewise tried both on final hearing in the district court and in the Circuit Court of Appeals, simply upon the *affidavits* submitted on a previous application for a preliminary injunction. Evidently the affidavits in those cases failed to show the fact that the words "Coca" and "Cola" had both been in general use during the whole of the ten-year period, otherwise it is inconceivable that the courts in those cases could have reached the conclusions they did.

But if it could be said, under the fact as disclosed in this case, that plaintiff had actually had the exclusive use, within the meaning of the Ten-Year Clause of the combination, "Coca-Cola," it is plain that its claim to a trade-mark therein would have to be strictly confined to the *combination*, and that it could not be extended to include either of those words when used *separately*, or in *other combinations*.

Nor could plaintiff obtain any greater measure of protection for the *combination* than is accorded to descriptive words which are not registerable, but which have acquired a secondary meaning indicating origin.

In *Thaddeus Davis Co. v. Davis*, 233 U. S., 461, 470; 58 L. Ed., 1046, 1050, the court, after stating that one who rightfully obtains registration of a descriptive word under the Ten-Year Clause is entitled to all the protection afforded by Section 16 of the Act, went on to say:

“But while this is true, the inquiry as to the extent of the right thus secured by the statute, in the case of marks which are admitted to registration under the ten-year clause, is not completely answered. It is apparent that, with respect to names or terms coming within this class, there may be proper uses by others than the registrant, even in connection with trade in similar goods. It would seem to be clear, for example, that the registration for which the statute provides was not designed to confer a monopoly of the use of surnames, or of geographical names, as such. It is not to be supposed that Congress intended to prevent one from using his own name in trade, or from making appropriate reference to the town or city in which his place of business is located; and we do not find it necessary to consider the question of the validity of such an attempt if one were made. Congress has admitted to registration names or terms belonging to the class under consideration simply because of their prior use as trade-marks, although they had not been such in law. Their exclusive use as a trade-mark for the stated period was deemed, in the judgment of Congress, a sufficient assurance that they had acquired a secondary meaning as the designation of the origin or ownership of the merchandise to which they were affixed. And it was manifestly in this limited character only that they received statutory recognition, and, on registration, became entitled to protection under the Act. In case, therefore, of marks

consisting of names or terms having a double significance, and being susceptible of legitimate uses with respect to their primary sense, the reproduction, copy, or imitation which constitutes infringement must be such as is calculated to mislead the public with respect to the origin or ownership of the goods, and thus to invade the right of the registrants to the use of the name or term as a designation of his merchandise. This we conceive to be the meaning of the statute. It follows that where the mark consists of a surname, a person having the same name and using it in his own business, although dealing in similar goods, would not be an infringer, provided that the name was not used in a manner tending to mislead (and it was clearly made to appear that the goods were his own, and not those of the registrant. *** Having duly registered under the act, the complainant would be entitled to protection against any infringing use; but, in determining the extent of the right which the statute secures, and what may be said to constitute an infringing use, regard must be had, as has been said, to the nature of the mark, and its secondary, as distinguished from its primary, significance."

But in the case at bar plaintiff is prevented from obtaining any relief at all, both by its unclean hands and by the express provisions of Sec. 21 of the Act, which provides:

"That no action or suit shall be maintained under the provisions of this Act in any case where the trade-mark is used in unlawful business, or *** has been used with the design of deceiving the public in the purchase of merchandise."

It is respectfully insisted, therefore, that the District Court erred in giving effect to the words "Coca-Cola" as a trade-mark.

**NO DECEPTIVE SIMILARITY BETWEEN THE WORDS
"KOKE" AND "DOPE" AND THE WORDS "COCO-COLA."**

If plaintiff had a trade-mark in the words "Coca-Cola," and were in a position to have that trade-mark protected, it would not be entitled to an injunction against the use by defendants of the words "Koke" and "Dope" on the ground that they infringe the words "Coca-Cola," for there is no evidence in the record that would justify a finding of infringement.

So far as the word "Dope" is concerned, it was not alleged in either the original or the amended bill that it deceptively resembles the words "Coca-Cola," or that it is an abbreviation there of, and plaintiff's counsel made no such insistence either in their argument at bar or in their brief. Just how the District Court reached the conclusion it did with respect to that word is a matter that does satisfactorily appear from the opinion. That the word bears no deceptive similarity to the words "Coca-Cola" was admitted by all of plaintiff's witnesses who were questioned on that point, as shown in the accompanying schedules.

That the word "Koke" does not deceptively resemble the words "Coca-Cola" has already been decided by two courts. In one of the cases the decision was final, the appeal having been dismissed; in the other, the court decided the question on the same record as that now be-

fore this court, a copy of the record in this case having been used as the evidence in that case.

The first case was that of *Coca-Cola Co. v. Branham, et al.*, 216 Fed., 264. In that case the defendants, who were bottlers and wholesale distributors of defendants' product, were using the word "Koke" on their packages in the same style of type as that in which the defendants in this case are using it, and the suit was brought, among other things, to enjoin its use as an infringement of the words "Coca-Cola." In passing upon the question of infringement, Judge Youmans said:

"There is no evidence to show that defendants have been guilty of infringement of plaintiff's trade name."

The other case was that of *Coca-Cola Co. v. Koke Company of America*, pending in the Patent Office. In passing upon the question of infringement, with the record in this case before him, the Examiner of Interferences said:

"The opposer [the Coca-Cola Co.] has not established by the evidence which has been introduced, and does not appear to have attempted to establish, that any person has ever been misled, as a result of any similarity or resemblance between the marks 'Coca-Cola' and 'Koke,' into a purchase of applicant's [the Koke Company of America's] goods believing them to be the goods of the opposer. In the absence of such proof, and in view of the fact that both parties have been actively engaged in a competitive business for a number of years, it should not be assumed that there is any likelihood of confusion, as originally alleged by the opposer, be-

cause of any resemblance which the mark 'Koke' bears to the mark 'Coca-Cola.' "

In the *Branham* case, *supra*, after alleging with much verbosity that the word "Koke" was a deceptive imitation and infringement of the words "Coca-Cola," and that its presence on the caps and labels of defendants' bottles, as there displayed, had misled the public into the purchase of defendants' product believing it to be the product of plaintiff, the bill proceeded:

"To aid in the deception so practiced, and by and with the advice, knowledge and consent of the respondents, said men and boys [who sell and dispense defendants' beverage to the public] at once, and before handing the bottles containing such substitute to the purchaser thereof, have been and are accustomed to *remove* the *caps* from said bottles *whereby the purchaser is likely to detect the deception practiced upon him.*" (*Defendants' Exhibit 272*), page 15)

In the case at bar, after alleging in the original bill that defendants brand their goods and packages with the word "Koke" printed in a style of type deceptively resembling that in which plaintiff prints the words "Coca-Cola," for the fraudulent purpose of causing the public to believe, when they see that word printed in that style of type on defendants' package, that it is plaintiff's alleged trade-mark "Coca-Cola" affixed thereto, and of thus deluding them into accepting defendants' product as the product of the plaintiff; and that defendants advertise their product under the name "Koke," and put up signs bearing that word, printed in that alleged decep-

tive style of type, at soda fountains and soft drink stands where their goods are on sale, for the fraudulent purpose of causing the public to believe, upon seeing the word "Koke," as so printed on said signs and advertisements, that it is "Coca-Cola" that it advertised and on sale at said establishments, and of thus causing them to patronize those establishments and drink defendants' product under the false notion that they are patronizing "Coca-Cola" establishments and are drinking "Coca-Cola;" and that, by the alleged fraudulent means aforesaid, defendants have enabled dealers to pass off their product as plaintiff's product; how did plaintiff go about proving these charges? It proved them, just as it did in the *Branham* case, by bringing forward evidence tending to show that dealers remove the crowns, bearing the word "Koke," from the bottles containing defendants' product, before serving same to the public, for the fraudulent purpose of preventing the public from seeing the word "Koke," printed in the alleged deceptive style of type referred to, on those crowns, and thus readily detecting that the article is not "Coca-Cola;" and that defendants shipped their syrup, in one instance, to a soda fountain proprietor who was fearful of incurring the vengeance of the Coca-Cola Co. by being caught handling the goods of a rival, in a plain barrel, with the label bearing the word "Koke" left off, for the fraudulent purpose of preventing the public from seeing the word "Koke" on the label and thus readily detecting that said dealer was carrying defendants' product and not plaintiff's; and that defendants do not advertise their goods at all, and do not place any signs bearing the word

"Koke" in conspicuous places about soda fountains and soft drink stands where their goods are sold, for fear that the public, on seeing the word "Koke," printed in the alleged deceptive style of type referred to, upon said signs and advertisements, will thereby at once detect that the establishment carries "Koke" instead of "Coca-Cola," and thus be led to shun it.

If this were not enough in itself to convince anyone that there is no deceptive similarity between the word "Koke" and the words "Coca-Cola," then the evidence of plaintiff's own witnesses upon this point, which is set out in the accompanying schedules, ought to remove all doubt on the subject.

In *Coca-Cola Co. v. Glee-Nol Bottling Co.* 221 Fed., 61, ("C. C. A."-5), plaintiff sought to enjoin the use of the word "Glee-Nol," printed in a style of script like that in which plaintiff prints the words "Coca-Cola," as an infringement of its alleged trade-mark, and as unfair competition. "Glee-Nol" was a beverage having the same color and taste as plaintiff's product, and was sold in bottles of the same size, color and shape, having caps or crowns of the same general design.

In disposing of the question raised by the defendant's use of script type for the word "Glee-Nol," the Court said:

"And it was not made to appear that the use of the defendant company of the same style of script as that used for the name 'Coca-Cola' on the bottles containing it resulted in there being any resemblance between the two names as they were re-

spectively displayed other than such as exists between two written or printed words which are wholly different, except in so far as a letter or letters common to both are alike."

The decree of the court below, which dismissed the bill, was affirmed.

But it is said that it is not so much the *appearance* of the word, "Koke" that is complained of as its *sound* when spoken. It is said that, the sound being that same as the sound of the first syllable of the word "Cocoa"—namely, the sound of "*coc*,"—its use amounts to an appropriation of a part of plaintiff's alleged trade-mark, and is an abbreviation of it in sound. Suppose it is an abbreviation of the word "Coca," and suppose it has identically the same sound; what right has the plaintiff to complain, unless it deceptively resembles the whole name,—the combination, "Coca-Cola?" Plaintiff's trade-mark rights, if it has any, are in the combination, "Coca-Cola," and not in either the word "Coca" or the word "Cola" considered by itself. Unless plaintiff can show an exclusive right to the word "Coca," it certainly cannot complain of defendants' use of an abbreviation of that word, or of a word having a sound resembling the first syllable thereof.

Finally, it is said that the *signification* of the word "Koke" is the same as that of the words "Coca-Cola," and that therefore infringement is shown. It is true that the word "*coke*,"—which may be taken to be the same word as "*Koke*"—means "cocaine," and that cocaine is

derived from coca and is its active constituent. But here, again, the alleged infringement is not of the *combination*, but only of a *publici juris* element of that combination. Besides even if "coke" had the same signification as the two words, "Coca-Cola," coupled together, still plaintiff could not complain, because the signification here involved is nothing more than the *primary descriptive signification* of the words "Coca-Cola," and, as has been seen, defendants have the right to signify the fact which the words "Coca-Cola" *primarily* signify, by any words that may be appropriate,—even the words "Coca-Cola" themselves,—and, if they choose, by the word "Dope."

Plaintiff, by its conduct in striking from the original bill all charges that "Koke" infringes "Coca-Cola," admitted that it was satisfied there was no infringement.

It is respectfully insisted, therefore, that the District Court erred in concluding that any infringement was shown.

The Alleged Nick-Names, "Coke," "Dope," Etc.

In this branch of the case it is not pretended that plaintiff has any propoerty rights of any kind in the words "Koke" and "Dope," or that it has ever used them as a mark of origin, or in any other way; or that they deceptively resemble its alleged trade-mark "Coca-Cola," or that defendants are using them in any particular manner which is unfair; or that their presence on de-

fendants' packages, or in their advertisements, as they are there displayed, ever has misled, or is likely ever to mislead, any one into supposing that the goods so marked or advertised are of plaintiff's manufacture. The complaint is based simply and solely upon the proposition that, by branding their packages with these words, and placing their goods in the market under the names "Koke" and "Dope," defendants have led retail dealers to dispense the beverage made from their syrup when customers of the retail stores,—consumers,—ask for "*coke*," or "*dope*." It is said that these words, and all similar expressions, such as "*shot-in-the-arm*," "*needle*," "*sniff*," "*cocaine*," "*caffcine*," "*poison*," "*eye-opener*," "*coffin varnish*," "*embalming fluid*," etc., etc., when used by the public in making known what they want, are used to indicate a *particular manufacture* of the commodity thus described, or suggested,—as distinguished from the *nature, ingredients, or effects* of that commodity,—and to specifically and definitely designate the article of *plaintiff's* manufacture as the *make* referred to; and that they are so understood by the retail dealers and dispensers. It is said, therefore, that the sale by retailers to consumers of any product other than that of plaintiff's manufacture in response to requests for "coke," or "dope," or any of the other numerus synonimus expressions, amounts to a sale of such product when plaintiff's product is specifically asked for, and, consequently, to a sale of such product as the product of the plaintiff; and that defendants, by encouraging this practice with respect to their product, through the use of the words "Koke" and "Dope" as the names thereof, have

induced dealers to thus sell their goods as the goods of plaintiff. In other words, it is said that the mere *use* by the defendants of the words "Koke" and "Dope," apart from the *manner* in which they are used, makes defendants responsible for this alleged unfair practice on the part of retail dealers,—at least to the extent that it affords encouragement to them to commit the acts complained of,—and it is urged that the defendants should be enjoined from thus placing in the hands of retail dealers,—not, indeed, an *instrument* of fraud, but a *color of justification* for committing an alleged fraud.

But if the words "coke" and "dope," and all the other synonymous slang expressions, are not used by the public to indicate any *particular manufacture* of the article thus asked for, but merely to indicate the *kind* of commodity they want by referring to the *nature, ingredients, or effects* of that commodity, then there is no basis for the contention that the sale of any product other than that of plaintiff's manufacture, in response to requests for "coke," "dope," etc., constitutes a sale thereof as the product of the plaintiff, for under such circumstances, the public have not asked specifically for *plaintiff's* manufacture, or for the manufacture of *any particular maker*, but have only asked generically for the *kind* of commodity primarily indicated by the words used, without indicating in any way *whose* manufacture they prefer, or that they *care* whose manufacture is served.

The only question to be considered therefore, and the one that strikes at the root of plaintiff's claim to a remedy, is: What do the words "coke and dope," and the

numerous other expressions of like import, when used by the public as verbal requests for "soft" drinks at soda fountains and soft drink emporiums, actually mean? Do they, either in themselves, or by association, point distinctively to *source* or *origin*,—to a *particular manufacture*; or do they, rather, merely point generically to *character*, *ingredients* or *effects*,—to a particular *kind* of commodity? What is the *nature* of the fact they are used to signify?

It is not disputed that "coke" and "dope" are purely descriptive slang words forming part of our common stock of language. It is admitted that "coke" is a slang word meaning cocaine, or a drug of that character, and that it is applied, as an adjective, to those who are addicted to the use of such drugs, or who sell them. It is admitted that "dope" is another slang word meaning any narcotic drug, and that it is not only applied, as an adjective, to drug-fiends and persons of that description, but that, as a transitive verb, it means to administer a stupefying or exhilarating drug to, and, as an intransitive verb, to be influenced by such a drug, or the condition of being under its influence. That this in the meaning of these words as well understood by everybody, is not only admitted by practically all of plaintiff's witnesses, but is confirmed by a number of dictionaries.² It is admitted that the other expressions, such as "shot-in-the-arm," "sniff," "eye-opener," "morphine cocktail," etc., etc., are all based on the same idea and all carry the same meaning. It is admitted that plaintiff's product

²See, ante, "Plaintiff's Unclean Hands.—Actual Deception of Purchasers.

contains caffeine, and that caffeine is a powerful stimulating drug such as the words "coke" and "dope," etc., describe. It is admitted that it formerly contained cocaine as well as caffeine, and that it was advertised and sold as a "brain tonic" and "nerve stimulant" for the cure of "headache and nervous exhaustion" and allied nervous affections. It is admitted that it is the general impression of the public that it contains cocaine, or some powerful drug of like character, and that many regard it as a "dope," or a medicine of some kind.

It is perfectly obvious, therefore, why, and in what sense, the public use the words "coke" and "dope," and all the other similar expressions, in asking for the character of drink plaintiff manufactures. They use them in the sense in which they are universally understood, to indicate the *kind* of drink which they appropriately describe, and to distinguish *that kind* of drink from *other kinds* of soda water, such as chocolate, vanilla, strawberry, etc., by referring to its distinctive characteristics. As so used, these words are merely *descriptive* of the *kind* of commodity primarily indicated thereby, and are as appropriately descriptive of that commodity when made by defendants as when made by plaintiff.

It is admitted that there are now on the market, and have been for many years, almost innumerable beverages of this description, and that the public are well aware of the fact that they contain some potent drug such as the words "coke" and "dope" aptly describe. It is shown by a large number of witnesses for defendants, and it is admitted by many of plaintiff's witnesses,

that those who know there are preparations of this kind other than plaintiff's on the market, apply the words "coke" and "dope," etc., to them all indiscriminately and as a class, as a means of distinguishing that *kind* of a drink from the *other kinds* of soda water, and not as a means of distinguishing any *particular make* of that drink from any other *make*.

From the fact that plaintiff is endeavoring to obtain an injunction against the sale of defendants' product, not only when "coke" or "dope" is asked for, but when "*any name or nick-name by which plaintiff's product is commonly known*" is used, such as "shot-in-the-arm," "needly," "sniff," "eye-opener," etc., it is manifest that the complaint, at bottom, is based, not so much upon the sale of defendants' product when "coke" or "dope" is asked for, or when any *particular word or phrase* is used, as when the *idea* that these various words and phrases express is conveyed,—that is, when the *article is described*, no matter *what* the *particular words* may be that happen to be used for that purpose. In short, what plaintiff is here complaining of is not *unfair* competition, but *any* competition.

In *Delaware & Hudson Canal Co. v. Clark*, 80 U. S., 311, 328, L. Ed., 581, 583, it was said:

"No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed.
* * * He has no right to appropriate a sign or a

symbol [or a word] which, from the nature of the fact it is used to signify, others may employ with equal truth, and, therefore, have an equal right to employ for the same purpose."

In *Trinidad Asphalt Co. v. Standard Paint Co.*, 163 Fed., 977, 981, 90 C. C. A., 135; *affirmed*, 220 U. S., 446, 55 L. Ed., 536, Circuit Judge Hook, in delivering the opinion, said (at page 981):

"If, at the complainant's instance, the court should enjoin the use of the word 'rubbero,' then, logically, none of the other manufacturers who make roofings resembling rubber could lawfully call their products 'rubber roofing' or 'rubberoid roofing' because of similarity to the term selected by complainant, and thus complainant would be allowed to fence off and appropriate to its exclusive use a part of our common vocabulary. As well might a manufacturer be decreed the exclusive right to call his sugar sweet or his vinegar sour."

But it is urged in all seriousness that, although "coke," "dope," "shot-in-the-arm," etc., may be purely descriptive words, having a simple and easy primary meaning well understood by everybody, nevertheless that they have been used by the public in association with plaintiff's product for so long a time that they have acquired a "secondary meaning," and have come to indicate in the trade, not only the *kind* of article which they describe, but *plaintiff's manufacture* of that article, and that they are now used by the public to distinguish that article, when made by *plaintiff*, from the same article when made by others.

Many cases involving the doctrine of "secondary meaning" have been before the courts, both in England and in this country, and numerous illustrations are afforded of the obvious difficulties which make it next to impossible for essentially descriptive words, having a simple and easy primary meaning, to acquire a secondary meaning as indicating the goods of a particular maker. Most of the cases in which the courts have held a secondary meaning to have been established have been cases involving geographical terms, or personal names, or words not so essentially descriptive as to prevent their partaking somewhat of the nature of fancy words. Few cases can be found where words that are essentially descriptive, and that are in common, every-day use, have been held to have acquired a secondary meaning. This for the reason that,—

"The court, although unwilling that a manufacturer should get a monopoly of a local name, recognizes that there is not the same necessity for the defendant to use such a name as in the case of a purely descriptive word; hence the burden on the plaintiff who seeks an injunction on the ground that such local name has come to indicate his goods only, is less than on one who seeks to show such a secondary meaning in the case of a descriptive word. [Sec. 1340, Vol. 27, *The Laws of England*, p. 757 (Earl of Halsbury).]

In *Computing Scale Co. v. Standard Computing Scale Co.*, 118 Federal, 965, the Circuit Court of Appeals for the Sixth Circuit had occasion to consider the doctrine of secondary meaning and the evidence necessary to estab-

lish it. It was first sought to sustain the words “computing” and “standard” as specific common-law trade-marks, but it was held that they were not trade-marks because purely descriptive. It was then sought to establish a secondary meaning for them. Mr. Justice Lurton, speaking for the court, discussed this aspect of the case as follows:

“But when the word is incapable of becoming a valid trade-mark, because descriptive, or geographical, yet has by use come to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his article as the product of another. * * *

“We come now to consider the case made for an injunction upon the ground of deceit and fraud. To sustain this aspect of the bill, the complainant must show that the word ‘computing,’ though primarily descriptive, and therefore not the subject of a technical trade-mark, has acquired in the trade a secondary signification, indicating a scale made or sold by the complainant. The evidence wholly fails to show that the word ‘computing,’ associated with scales, had come to stand for the scale made by complainant at the time the defendant began its use as descriptive of its own scale. Upon the contrary, the weight of the evidence is that its trade-meaning, accorded with its primary signification, and that, instead of standing for any manufacture, it stood for a class of scales. In short, the name stands for a machine, and not for a maker. It will be of no public importance to summarize the evi-

dence in order to support this conclusion. The testimony as a whole, including the catalogue and other advertising matter issued by the complainant, is ineffectual to show that either the public of the complainant itself regarded the word 'computing' as indicative of the maker, and not the machine."

* * *

"We will not pursue the facts further. The complainant's case is not made out, so far as it is built upon the claim that 'computing' had come to have a well known secondary meaning, pointing to the origin or maker of the scale."

The leading case dealing with the question of secondary meaning is that of the *Cellular Clothing Co. v. Maxton & Murray*, which originated in the Court of Sessions in Scotland in 1898 and finally found its way into the House of Lords where the evidence required to establish secondary meaning was considered at great length.

In the Court of Sessions, in Scotland [Outer House, March 12, 1898] 15 Rep. Pat. Cas., 602, Lord Kyllachy, the Lord Ordinary, said:

"The issue which I have to try is, I apprehend, simply an issue of fact, and it is this: Have the Pursuers proved to my satisfaction (1) that, in the market in which the Defendants trade, 'Cellular' cloth means the Pursuers' cloth; and (2nd) that the Defendants have marked or designated as 'Cellular' cloth sold by them or offered by them for sale in such manner as to be likely to mislead purchasers,—either purchasers from themselves or from shop keepers with whom they deal? We have a great

deal of evidence,—some of it, perhaps, a little wide of the mark,—but in order to estimate its effect there is one point on which at the outset I have found it necessary to make up my mind. Is this word ‘Cellular’, as applied to cloth, what is known as a fancy name, or is it a properly described name, or, if it is neither in strictness, to which does it [603] more closely approximate? It is obvious that according to the answer the burden of proof on the Pursuers may be very light or more or less heavy. If a man having goods to put in the market hits upon a name,—not necessarily an invented word, but a name which has no relation to the character or quality of the goods,—and, by advertisements or otherwise, applies the same to his goods, that name (apart from all questions of trade-mark) becomes *prima facie* the market name of his goods, and no evidence, or very little evidence, is required to prove that it is so recognized in the market. ** On the other hand, where goods are put into the market described simply according to their character or quality by appropriate English words, the proposition is just reversed. ‘It may be,’ to use Lord Herchell’s words in the case of *Reddaway v. Banham*, ‘capable of proof that the use of such words, by themselves and without explanation or qualifications, has the effect, in particular circumstances, of deceiving purchasers into the belief that they are getting the goods of A, while they are really getting the goods of B.’ That is the point,—and, I rather think, the only point,—decided in the case of *Reddaway*. But while such proof is possible, the difficulty of proof is necessarily great. For, *prima facie*, it is scarcely credible that (putting aside the special conditions of the foreign markets)

men of business will be found to suppose that a manufacture that has taken the market, and is unprotected by patent, can long continue to be produced by a single firm; or fail to know that a manufacture described merely by character and quality is as likely to be the product of one firm as of another. Witnesses may no doubt be found to say the contrary,—to say that they would or might have so believed. But the question is, would they really have done so, or been likely to do so, if brought to the test? And one is apt to be skeptical about general statements of that kind. ***

[604] “There can be no doubt that the word ‘Cellular’ is an ordinary English word. It is to be found in all dictionaries, and is part of the common stock of language. It is quite commonly applied to describe a certain structure of the natural substance, and, *prima facie*, it is equally open to describe a certain texture of woven goods. It is said, however, that, as applied to cloth, it was in fact a term new and peculiar; and, in a sense, that is no doubt true. But the question, I apprehend, is whether it was not all the same a quite accurate and natural and appropriate term,—indeed the most natural and appropriate term,—wherewith to describe this particular kind of cloth. Now, as to that, it is, I think, fair to refer to the Pursuers’ own description of the character and qualities of their fabric. I take their original advertisement, viz., from the *Lancet*, of June, 1888, No. 31, of Process. There they say: ‘The principle involved in this material, both for over and under clothing, is that it is cellular in structure, so that advantages is taken of the non-conducting power of air to make it a

covering for the body equally fit for the cold winter or the warmth of summer.' ***

"It seems to me that, if these passages accurately describe the character and qualities of the Pursuers' cloth, it is not possible to hold that the term 'Cellular' is, as applied to that cloth, a term at all arbitrary or fanciful. On the contrary, it appears to me to be a term simply and accurately descriptive of the particular fabric. Assuming that the fabric consists of a number of small cells, and that its merit and advantage is that it is woven in that way, I think that to call it 'Cellular' is to call it by its natural and appropriate name. If its feature had been simply porosity, and it had been called 'porus' cloth, I do not see that the question would have been different. *** Now, this being so,—the name being simply descriptive,—it is, as I have already stated, extremely difficult to appropriate such a name by attaching to it a secondary and restricted sense which shall make it, not a descriptive name, but a name for the goods of some particular maker. Still, this is, as has been held, possible; I must, therefore, consider the evidence by which the Pursuers propose to establish the transformation that they allege.

"That evidence may be said to be of two kinds. In the first place, there are adduced a number of witnesses engaged in the soft goods trade who state generally what they understand, and what they understand the trade to understand, by the words 'Cellular Cloth.' I have nothing to say against that evidence. It is largely made up of the testimony of persons who are the Pursuers' agents or are in some way connected with them. But it is not met

by counter evidence; and it is probably as reliable as such evidence usually is. All I need say about it is that it did not make much impression on my mind.

“The Pursuers have, also, however, proved certain facts, and, in particular, these: (1) That although prior to 1888 goods were in the market to which the adjective ‘Cellular’ might, without violence, have been applied, the word was not in fact so applied but was first applied by the Pursuers in or about that year; (2) that the Pursuers have, since 1888, used every effort to appropriate the word, or to associate it with their goods,—advertised it liberally, if not profusely, and claiming the word as theirs by every means in their power; (3) that in particular, they have, by threats of legal proceedings, compelled or induced a number of persons, mostly retail shop keepers throughout the country, but in at least two cases companies with a board of directors, to give undertakings to desist from the use of the name; and (4) that, as the consequence of these proceedings, or for other reasons, various firms,—one, at least, a firm of position in London,—have, in selling cloth closely resembling the Pursuers’, adopted names of their own more distinctive, and, in fact, fanciful, e. g., the word ‘Cellinette’ adopted by Messrs. Morley. That, I think, is a fair statement of the Pursuers’ proof.

“Now, I do not say that there is not here a case that requires to be considered, but for the purpose of the present action it appears to me to fall short of what is required, and to do so especially for two reasons. In the first place, it has to be noted that the case which the Pursuers make, and

must make, against the present Defenders is a case of indirect misrepresentation, i. e., misrepresentation to the general public through the retail shop keepers. The Defenders are wholesale merchants, and it is not suggested that they themselves sell, or are likely to sell, except to persons in the trade who know quite well that they are merely their own goods and not *e. g.*, the goods of the Cellular Clothing Co. At all events, it is clearly proved that they have never in fact sold except to such persons. *** The alleged deception is, therefore, as I have stated, deception of the general public,—the customers of the retail shops; and, that being so, the difficulty, as it seems to me, is that, so far as I can discover, there is no evidence which goes to show that among the general public the word ‘Cellular’ has in fact acquired any secondary or special meaning. I may be wrong, but I can find no evidence that the average customer who asks for, or is shown, cellular shirts or cellular cloth, knows, or for that matter cares, by whom the material has been made or put into the market. It is true that by the Pursuers’ advertisements their ‘Cellular’ cloth is extensively advertised, and advertised as only obtainable wholesale from the Pursuers’ Company; and, no doubt, there are persons who read these advertisements, and who accept their statements, and who, therefore, associate all ‘Cellular’ cloth with Pursuers. There are probably, also, persons (perhaps more numerous) who assume that an article so advertised is a patented article and can only be produced by the patentees. And again, there are, I dare say, others who, knowing or recollecting nothing of the Pursuers’ name, assume generally that an article advertised is produced by the advertisers. The question, however, is not as

to isolated persons who draw undue inferences, or even as to the class of persons who read and are impressed by advertisements. The question is as to the general public. And as to them, all I can say is that, sitting here as a jury, I am not able to hold it proved that, either in England or Scotland, the public recognize the word 'Cellular' as denoting the Pursuers' goods. ***

[606] "I perhaps should add a word with regard to the undertakings obtained from various retail dealers, and the injunctions obtained against some of them. It appears to me that this kind of evidence is to some extent double edged. There is no doubt that a certain number of dealers, either because satisfied of the Pursuers' rights or because they did not consider the matter worth contesting, have been found (1) to admit that they had in good faith used the word in controversy; and (2) to undertake that they would not in the future do so. But, on the other hand, it must be observed that these undertakings, and the correspondence relative to them, seems also to show a somewhat widespread ignorance of the alleged secondary sense of the word 'Cellular.' And I must also observe, with respect to the injunctions, that the evidence as to their issuance would have had greater weight if it had not appeared that the injunctions were granted of consent, and that in two of them,—if not, also, in the third,—consent followed on payment by the Pursuers of the Defendants' costs.

"Altogether I have come to the conclusion that the Pursuers have failed to prove their case and that the Defenders are entitled to absolvitor."

On appeal to the Inner House (15 Rep. Pat. Cas., 610), the judgment of the Outer House was affirmed. Finally, an appeal was taken to the House of Lords (*Cellular Clothing Co. v. Maxton & Murray*, L. R. (1899) A. C., 326; 68 L. J. P. C., 72; 80 L. T. Rep., N. S., 809; 16 Rep. Pat. Cas., 397), where the judgments of both lower courts were affirmed.

Lord Shand (16 R. P. C., 406):

“My Lords, notwithstanding the anxious and able arguments presented on behalf of the Appellants, I am clearly of the opinion that the Court of Sessions has come to a sound result, and that this appeal ought to be dismissed. For my part, I entirely adopt the clear and valuable judgment of the Lord Ordinary, Lord Kyllachy, and I rely on the ground of judgment which His Lordship has so well stated.

“I must, however, add that I do not participate in even the slightest hesitation which His Lordship has expressed as to whether the word ‘Cellular’ may not, to a certain extent, partake of the character of a fancy name. I am of the opinion that the word is purely descriptive and was so used by the Appellants. The cloth advertised and sold by them has been and is called ‘Cellular’ because it is cloth the texture of which is made up of cells. The term ‘Cellular’ is used in its ordinary signification, and it was and is used because it aptly and properly describes the goods or material sold. It is unnecessary to elaborate the point, for I think it was scarcely disputed by the learned counsel for the Appellants. But I find the clearest evidence of its

being simply a descriptive term in the advertisements and price lists which the Appellants themselves circulated. In the price lists they expressly say, ‘“Cellular” cloth is so woven that it consists of an infinite number of small cells, and, in the advertisements, as the Lord Chancellor observed, the Appellants have made it quite clear that they were merely adopting the word as properly describing their goods. They have adopted a word which is in ordinary use, and they have used it in accordance with its ordinary signification in the English language.

“My Lords, there is a vital distinction in cases of this class between invented or fancy words or names, or the names of individuals, such as ‘Crowley,’ or ‘Crowley Millington,’ attached by a manufacturer of his goods and stamped on the article manufactured or sold. The idea of an invented or fancy word used as a name is that it has no relation, or, at least, no direct relation, to the character or quality of the goods which are to be sold under that name. The word used and attached to the manufacture being an invented or fancy name, and not descriptive, it follows that, if any other persons proceeds to use that name in the sale of his goods, it is almost, if not altogether, impossible to avoid the inference that he is seeking to pass his goods off as the goods of the other man. ***

[407] “A totally different principle must be applied in the case of goods which are sold under a merely descriptive name. If a person employing a word or term of well known signification and in ordinary use, though he is not able to obtain a patent for his manufacture, and although he has not

got the protection of a registered trade-mark for the goods he is proposing to sell, is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods, and to shut others out from the use of the descriptive term, he would really acquire a right much more valuable than either a patent or a trade-mark; for he and his successors in business would gain the exclusive right, not for a limited time as in the case of a patent, but for all time coming, to use the words as applicable to goods which others may be desirous of manufacturing, and are entitled to manufacture and sell as much as he is. That being so, it appears to me that the utmost difficulty should be put in the way of any one who seeks to adopt, and use exclusively as his own, a merely descriptive term.

“My Lords, the case on which the Appellants have chiefly relied is that of the ‘*camel hair belting*’—the case of *Reddaway*. Of that case I shall only say that it no doubt shows that it is possible, where a descriptive name has been used, to prove that so general,—I should rather say so universal,—has been the use of it as to give it a secondary meaning, and so to confer on the person who has so used it a right to its exclusive use, or, at all events, to such a use that others employing it must qualify that use by some distinguished characteristic. But I confess I have thought,—and I still think,—that it should be made almost impossible for any one to obtain the exclusive right to the use of a word or term which in ordinary use in our language, and which is descriptive only; and, indeed, were it not for the decision in *Reddaway*’s

case, I should say this should be made altogether impossible.

“It is true the question in issue in cases of this class may generally be broadly stated as: Did the Defendants by their representations seek to induce purchasers to acquire their goods under the false belief that these goods were of the Plaintiff’s manufacture? If it can be shown that representations to the effect that the goods were manufactured by the Plaintiffs be made directly or by implication by the language used, the Plaintiffs would, of course, be entitled to a remedy. But where the Plaintiffs’ proof shows that the only representation by the Defendants consists in the use of a term or terms which aptly and correctly describe the goods offered for sale, as in the present case, it must be a condition of the Plaintiffs’ success that they shall prove that these terms no longer mean what they say,—no longer mean only what they say,—but have acquired the secondary and further meaning that the particular goods are goods made by the Plaintiffs, and, as I have already indicated, it is, in my view, difficult to conceive of cases in which the facts will come up to this. Unless that be proved, there is no room for a charge of violation of any right, or indeed, of a charge of fraud, for the Defendants are only exercising the right which they possess as much as the Plaintiffs do, and which every one has, to employ words in ordinary use which are an apt and proper description of the goods for sale. ***

[104] “As to the proof itself, I have only this to say: It must not be forgotten that it is on the Pursuers that the onus lies in seeking to appropriate as their own a descriptive word such as the

word 'Cellular.' It is for the Pursuers to show that in Scotland the term has acquired with the trade and with the public the signification they seek to attach to it. We have a large body of evidence for the Defenders to the effect that nothing of the kind has occurred. *** 'Taking the evidence as a whole, and keeping in view that the onus is on the Pursuers to establish by proofs that a special secondary meaning has been attached to the word 'Cellular,' I am clearly of the opinion that they have failed to make out their case."

Lord Davey [page 409]:

"The other observation which occurs to me is this: That where a man produces, or invents, if you please, a new article, and attaches a descriptive name to it,—a name which, as the article has not been produced before, has, of course, not been used in connection with the article,—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds, and is associated by them with, the Plaintiffs' goods alone, is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and, therefore, there was nothing to compare with it and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to, except the Plaintiff. ***

[409] "In the present case I hold with the learned judge of the court below, and with Your Lordships, that there are certain facts which are beyond

controversy. I take it as regards the Defenders, the present Respondents, that it is established that they have done nothing whatever to represent their goods to be the goods of the Pursuers unless the use of the word 'cellular,' without the addition of any other term,—the simple use of the word 'cellular,'—is sufficient for that purpose. ***

"My Lords, I will assume for the purpose of this case that the Pursuers *** first introduced the article,—the cloth which is manufactured in this particular 'Cellular' mode (I am obliged to use the word 'cellular' because I know of no other word to express it) and they first attached the name 'Cellular' to the cloth manufactured in that particular mode. Whether this is so is not quite clear from the evidence, but I assume that Mr. Haslorn's statement in that respect is correct. I think it is established by the evidence that the word 'cellular' is beyond all question of a descriptive character. I need only refer to the advertisements issued by the Pursuers themselves for that purpose. ***

[410] "Then, My Lords, that being so, what is the evidence on which the Pursuers rely for the purpose of showing that the word has acquired a secondary meaning so that the mere simple use of the word is alone evidence of a misrepresentation by the Defendants? ***

"My Lords, the second class of proof is that of the witnesses who say in effect this (I will take one of the best, and, I think, one of the earliest, witnesses,—Mr. Henley): 'If I heard any one in the trade speak of "cellular" goods I would understand that he meant the product of the Cellular

Clothing Co.' Well, My Lords, so long as the Cellular Clothing Company were the only company making cellular goods, that would not be astonishing, and, so long as they retain the monopoly, no doubt that might be the case; but, as I have already said in speaking of the proposition generally, this is very slender evidence upon which to found the superstructure which the Pursuers' counsel endeavored to erect upon it, and, indeed, unless the gentlemen who give evidence of that kind know that there are other manufacturers making similar classes of goods, there is nothing to compare it with and they are merely stating a fact.

"The third class of evidence consists of cases in which the Pursuers have induced certain persons to submit to injunctions and pay costs. That does not appear to me to be very strong evidence in favor of the Pursuers. Of course, a shop keeper, or a person in that position, would hesitate a long time before he incurred the expense,—which in the case of a trade-mark or of a patent case is no slight expense,—of defending an action of this character. Probably the value to him of the trade he would lose would not in any way compensate for the risk he would run. Therefore, as evidence of fact, I do not attach much importance to those cases."

Burberry's v. J. C. Cording & Co., 26 Rep. Pat. Cas., 700 [High Court of Justice, Ch. D., Sept. 28th., 1909], Parker, J:

"The precise relief asked for by the Plaintiffs in the action is an injunction to restrain the Defendants from selling, advertising or otherwise

dealing with coats or over-coats not of the Plaintiffs' manufacture or merchandise under the name 'Slip-on.' In other words, they claim a monopoly of the word 'Slip-on' in connection with coats and over-coats generally, and they base their claim on the contention that the word as applied to coats and over-coats has become by user distinctive of their goods and cannot be used in respect of goods of another trader without deceiving the public and injuring Plaintiffs in their business. ***

"The principles of law applicable to cases of this sort are well known. On the one hand, apart from the law as to trade-marks, no one can claim monopoly rights in the use of a word or name. On the contrary, no one is entitled by the use of any word or name, or, indeed, in any other way, to represent his goods as being the goods of another to that party's injury. If an injunction be granted restraining the use of a word or name it is no doubt granted to protect property, but the property to protect which it is granted is not property in the word or name but property in the trade or good-will which will be injured by its use. If the use of a word or name be restrained, it can only be on the ground that such use involves a misrepresentation, and that such misrepresentation has injured, or is calculated to injure,*another in his trade or business. *** It is important for this purpose to consider whether the word or name is *prima facie* in the nature of a fancy word or name, or whether it is *prima facie* descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others.

If the word or name is *prima facie* descriptive, or be in general use, the difficulty of establishing the probability of deception is greatly increased. Again, if the person who seeks the injunction has not used the word or name simply for the purpose of distinguishing his own goods from the goods of others, but primarily for the purpose of denoting or describing the particular kind of article to which he has applied it, and only secondarily, if at all, for the purpose of distinguishing his own goods, it will be more difficult for him to establish the probability of deception. ***

“With these preliminary observations, I will proceed to deal with the history of the word ‘Slip-on’ and will first consider the period ending in 1894, when the word was first used by the Plaintiffs.

“Upon the evidence before me it appears that the word ‘Slip-on’ was first used by a novelist in the early part of the last century as the name of a coat known in the Highlands of Scotland, the peculiarity of which was its capability of being thrown over the shoulders and worn like a cloak, the sleeves hanging down the back. In this sense the word found its way into various dictionaries, including Webster’s Dictionary, which is quoted in Defendants’ catalogue. I also find as a fact that the word was from time to time used prior to 1894 both as a noun and as an adjective, denoting in the one case, and describing in the other, garments,—not necessarily coats,—which easily slip on and off. *** As so used, I think the word was purely descriptive of the article to which it was applied. ***

“The result of this evidence appears to be that

in 1894 the word 'Slip-on' was in actual use both as an adjective and as a noun. As a noun it meant, and as an adjective it described, a garment, not necessarily a coat, which slipped on easily. As applied to coats, however, it connoted a particular cut, viz., a cut of the 'Raglan' or 'Talma' type. It did not connote the material. I do not think the word was in very general use either in the trade or among the public. It was, however, undoubtedly used by a considerable number of tailoring firms and by their customers. Probably the latter, when they used the word, referred only to the particular garment they were accustomed to purchase from the former under that name or description. On the other hand, many dealers did not know the word at all until after 1894.

"In 1894 Plaintiff introduced to the trade and to the public a light, loose rain-resisting coat cut in a similar way to the 'Raglan' or 'Talma,' and made of a material rendered rain proof by chemical treatment, and not by the use of rubber. 'This coat they called, and have since continuously advertised and sold as, a 'Slip-on,' and they seemed to have been, until recently, under the erroneous impression that they had invented, or were the first to use, the word. 'They adopted the word 'Slip-on' because it aptly described the chief characteristics of the coat in question, and they used it from the first as the name of, or as an adjective describing, that particular kind of coat as distinguished from other kinds of coats, and not to distinguish coats made by them from coats made by other firms. This is abundantly clear from their advertisements and catalogues. *** In 1897 they began to advertise on a large scale. In all their advertisements and other

trade literature they have used the word 'Slip-on,' not only as the name of the article sold by them, but in close connection with their own name, as the maker of the article. Every 'Slip-on' they have sold has had a label sewn in the collar containing not only the word 'Slip-on' but their own name as the firm that makes or supplies the article.

"There can, I think, be no doubt that by means of their extensive advertisements and the consequent increase of their business, the word 'Slip-on' has in the trade, and among the public who buy this sort of article, become generally associated with their firm's name.

"Probably to the large majority of persons who require light rain proof over-coats for use while hunting, or fishing, or riding on bicycles, or in motors, or playing golf, the word 'Slip-on' will at once suggest, not only the cut and material of the garment, but the name of the firm which advertises these garments so largely and has been so successful in satisfying the needs of the sporting section of the community. So far as the trade is concerned, the Plaintiffs have contributed to the same result by continually insisting upon their right to the exclusive use of the word as distinctive of the goods of their manufacture, and threatening other traders who have attempted to use the word with legal proceedings. Summing up what the Plaintiffs have done I think it may be stated as follows: First, they have adopted as the name of a particular kind of cloth which they intended to introduce to the trade and to the public a name which aptly described, and which they intended to describe, one of the chief characteristics of the article to which it was

applied; secondly, by their advertisements, catalogues and trade circulars, they have identified the name so chosen with the article to which it was applied in such a manner that, besides describing the chief characteristics of the coat, has come to connote also the cut and material; thirdly, by these same advertisements, catalogues and trade circulars, by the consequent world wide development of their business, by their labels and by their claim to monopoly rights in the word, they have associated this name with the name of their firm in the mind both of the trade and of that section of the public which requires coats of that class to which they applied the word. ***

“The real question is whether, under the circumstances above described, there is any reasonable probability of deception if the Defendants continue to use the word ‘Slip-on’ in the way they have done and are doing. In considering this question it must be borne in mind that, upon the facts as I have found them, the word ‘Slip-on’ is, and has always been, used by the Plaintiffs primarily as a word descriptive of goods of their own manufacture. If it has come to distinguish their goods from those of others, it has done so by acquiring a secondary meaning without losing its descriptive character. Though I do not agree with the argument that a word cannot be at the same time both descriptive and distinctive, I think the fact that it retains its *prima facie* descriptive signification increases the difficulty of proving that it is distinctive of the goods of any particular manufacturer. If a word is *prima facie* the name of, or a description of, an article, evidence that it is also generally associated with the name of a particular manufacturer is,

in my opinion, by no means conclusive that it has become a distinctive word which cannot be used of the same article when made by others without risk of deception. If the article in question is made exclusively, or mainly, by a particular manufacturer, it is almost bound to be associated with the name of that manufacturer by the trade and public, for each trade, and each member of the public, will naturally associate the article with the name of the manufacturer who supplies it to him, and who may possibly be, in his opinion, the only person who supplies it at all. When a witness says that he knows the word 'Slip-on' as meaning not only a particular kind of coat but the coat of a particular manufacturer, it is material to know whether he is acquainted with the article as made by any one else. If he is not, the word, however it may be associated in his mind with the particular manufacturer, is not really to him a distinctive word. The danger of relying too much on what is said by persons in this position is well illustrated by the evidence of Mr. Kelson, the editor, or former editor, of 'Sporting Celebrities.'—(Q) Speaking from your wide experience, what does the word "Slip-on" mean amongst that section of the public with whom you are brought in contact? (A) It is a weather-proof coat made by Burberry's. (Q) Does "Slip-on" give you an idea of the kind of garment it is? (A) It is a water-proof gabardine. (Q) What is its characteristic shape, if it has any? (A) It is a kind of cloak with sleeves. (Q) Is it loose? (A) Yes. (Q) Has it a characteristic shape? (A) No, I do not think it has any characteristic shape. I could tell one if I saw it across the room.' Later he said: 'If I saw a gentleman in the street com-

ing along with a "Slip-on" I should recognize it.' It is quite clear from this that Mr. Kelson knows a 'Slip-on' only as a particular kind of coat, and that, to him, the additional fact of its being a coat of Burberry's manufacture is an inference from his knowledge that Burberry makes this particular sort of coat. He knows nothing of similar coats made by other manufacturers. I think Mr. Kelson's evidence the more important because he belongs to that class of the public who buys 'Slip-on' coats and is in no way connected with the trade.

"Proceeding to analyze somewhat more in detail the evidence given on behalf of the Plaintiffs, and confining myself for the present to the witnesses not connected with the trade, I am inclined to think the same contention applies to what was said by Mr. Harford, the principal of Livingston College. He knows Burberry's 'Slip-ons' and recommends them extensively to his missionary friends. He does not know the name 'Slip-on' in connection with any firm except Burberry's, but this is quite consistent with his evidence that he does not know of any other manufacturer who sells coats of the particular class which he knows as 'Slip-ons.' Again, Mr. Marston knows 'Slip-ons' as being a particular kind of garment, but only in connection with Burberry's. He knows too much about the matter to be deceived by the use of the word by other firms. If other firms use the name he would merely think they were using Burberry's name for the article they were selling. Once more, Mr. Jones, a writer on sporting subjects, said that 'Slip-on' conveyed to his mind a distinctive species of top coat advertised and sold by Burberry's, and, exclusively by them, so far as he knew. Under these circumstances

he naturally knows the coat as an article sold by Burberry's. If he saw an advertisement of Jones' 'Slip-ons' he would think, he said, that Jones was trying to trade on Burberry's word. He would not be deceived. He thinks, however, that if an ordinary member of the public saw the cards in the defendants' window they would associate the words 'Slip-on' appearing on the card with the Plaintiffs' firm. Mr. Burberry's evidence is to the same effect. He would gather from the defendants' advertisements that they were simply trying to utilize a name belonging to the Plaintiffs. Mr. Barker, a barrister, knows the Plaintiffs' firm and orders 'Slip-ons' from them by that name. He means by 'Slip-on' a loose coat made by Burberry of gabardine. If he saw the word with a fancy prefix he would associate it with Burberry's.

"Mr. Harrison, a land agent, said that he and his acquaintances speak of their Burberry coats as 'Slip-ons' simply. There is no suggestion of either being acquainted with light coats made by others, or that, to them, the word 'Slip-on' distinguishes a coat when made by Burberry's from the same coat when made by another. Mr. James Brown's evidence is to the same effect, but he said expressly that he had never seen goods of the same kind or character made by any one other than Burberry's. The same criticism applies to the evidence given by Mr. Hustler, Mr. Parsey, Mr. Holley, Mr. Muirhead and Mr. Crombie. The last named witness, if asked by any member of his staff in Aberdeen to procure him a 'Slip-on' in London, goes as a matter of course to Burberry's for the article required. If asked to procure a 'Cording's Slip-on' he would, until this action, have thought it a mis-

take and have suggested that a Burberry's 'Slip-on' was meant. If the request had been persisted in, he would have inquired as to who Cording was. ***

"The trade witnesses of the Plaintiffs may be divided into two classes: first those who have no connection with the Plaintiffs' firm; and, secondly, those who were their agents,—not agents in the strict sense of the word,—but who buy the Plaintiffs' goods on special terms and re-sell either to the trade or public, and whose interest is to make their re-sales as large as may be. These latter classes may be divided into those who do not sell, and those who do sell, the goods of manufacturers others than the Plaintiffs in competition with Plaintiffs' goods.

"I will first consider the evidence of those witnesses who are unconnected with Plaintiffs' firm. The first of these is Mr. Hardy, the managing director of M. Hyam Clothing Company, Ltd. He has always associated the term 'Slip-on' with Burberry's, and does not think the term had any commercial value until Burberry's gave it that value. He considers the term to have now considerable commercial value. He knows of no other firm which makes 'Slip-ons' except Burberry's. His firm makes a similar class of goods, but calls them by a different name as near as can be got to 'Slip-on,' namely: 'Slip-easy.' If asked for a 'Slip-on' he would know the sort of article required, but he does not think he is justified in using a name which has been 'built up' by Burberry's. He would not be deceived by Defendants' advertisements. Mr. Baker, of Charles Baker & Company, only knows the word 'Slip-on' in connection with Burberry's. He has also understood it to mean an easy fitting

coat. It has come to mean this because Burberry's, having coined the word, have, by their advertisements, given it this meaning. It is in fact Burberry's word. To Mr. Leggatt, the editor of a tailoring journal, 'Slip-on' has always meant a coat with sleeves of a particular cut. Asked how many people make that coat, he answered, 'I should not like to say, Burberry's advertise it,' and he knows of no one else who uses the term. ***

"Passing to the evidence of Plaintiff's so-called agents; Mr. Seale, of E. & W. Seale, Ltd., Dublin, deals not only in the Plaintiff's goods but in similar goods made by other firms. 'Slip-on' to him is a particular kind of coat, but he knows the word only in connection with Burberry's goods. Other firms call similar coats made by them by different names, such as 'Slip-over' or 'Glide-on.' ***

"Mr. Lemon, of Lemon & Sons, sells nothing made of chemically rain-proofed material except the Plaintiff's goods. He knows the word 'Slip-on' only in connection with Plaintiff's goods and supplies such goods if asked for 'Slip-ons.' If he saw the word 'Kathador-Slip-on,' without more, he would think it a 'Slip-on' of Burberry's manufacture. He would not be deceived by the expression 'Cording's-Slip-on,' for 'Slip-on' to him describes a particular sort of garment; but he thinks the public might be deceived into thinking one was selling garments made by Burberry's. ***

"I have given sufficient illustration to show the nature of the trade evidence adduced on the Plaintiff's behalf. I think it evident that a great number of traders in all parts of the country con-

sider, when asked for a 'Slip-on,' that a Burberry's coat is meant, and supply a Burberry's coat accordingly. At the same time a 'Slip-on' is to them a coat of a particular cut and material, so that if they were asked to make a 'Slip-on' themselves they could readily do so without further instructions as to cut or material. They would not, I conclude, be deceived by anything the Defendants have done.

*** Many of them would, however, quite apart from any question of deception, consider that Cording's were acting unfairly by Burberry's in using a word which the latter had rendered popular at a vast expenditure in advertisements. 'This expenditure, they think, entitled Burberry's to consider the word as a trade asset in which they had a valuable monopoly, and they did not think it right to use the word of their own goods, though it is a word that aptly describes such goods. *** If the word is descriptive, or becomes the name of the article, it will be difficult, if not impossible, to prove that it is distinctive of his own goods, or that there will be any deception in its use by others, and, apart from the Trade-Mark Acts, the right of any one to the exclusive use of a word is always limited by the possibility of its use by others without any risk of deception.

"I have come to the conclusion that, so far as the trade is concerned, whatever traders may think of the moral claim of the Plaintiffs to the exclusive use of the word 'Slip-on,' there is no reasonable probability of any of them being deceived by what the Defendants have done or are doing.

"It remains to be considered whether there is any reasonable probability of deception on the part

of the public. 'Taking the first advertisements complained of, it is, in my opinion, reasonably clear that any person of ordinary intelligence who read them would conclude that the 'Slip-ons' referred to were the Defendants' 'Slip-ons.' If he omitted to notice the Defendants' name, and thought that the 'Slip-ons' referred to were Burberry's 'Slip-ons,' he would, if he acted on the advertisements at all, apply to Burberry's and the latter would not be injured. *** I come to the conclusion that the risk of deception from anything which the Defendants have done is extremely remote. *** It is only rarely that an English word, primarily descriptive, and which has become the name of a particular article of commerce, can be so distinctive of the goods of a particular manufacturer that the court will restrain its use as calculated to deceive where there has been no actual deception and no intention to take a fraudulent advantage of another by using the word. It is of course, a truism to state that unfair dealing of any sort ought to be restrained by courts of justice, but there is another principle, and one equally important, namely, that everybody dealing in an article of commerce is entitled to use any words which are, or have become, current in the English language as denoting or describing that article, provided he can do so without deceiving the public to another's injury. I am speaking, of course, without regard to the trade-mark legislation. The word 'Slip-on' was a well known word in the English language long before the Plaintiffs used it at all. Though not in very general use, it was used by a considerable number of dealers and their customers as denoting or describing a coat of a particular cut. Such use has continued to the present time. The word

possibly now denotes generally not only the cut but also the material of the article to which it is applied. This is probably in the main due to what the Plaintiffs have done, but it still denotes primarily a particular kind of coat which it is open for any one to make. It is generally associated with Plaintiffs' firm because the Plaintiffs' firm is by far the most celebrated maker of coats of the sort. If other traders wish to meet the popular demand for the kind of article primarily denoted by the word 'Slip-on,' they are at liberty to do so, and, to grant an injunction restraining them from using the term by which the article is known, would, unless there is strong evidence that such use would be calculated to deceive by reason of some secondary meaning of the word, be, in my opinion, an undue interference with trade, and tend towards establishing a monopoly. I have come to the conclusion that the evidence of probable deception in this case is not strong enough to warrant my granting the injunction that is asked. In my opinion, neither the trade nor any member of the public endowed with any ordinary intelligence is likely to be deceived by anything which the Defendants have done. There will be judgment for Defendants with cost."

Dewar v. Dewar, 17 R. P. C., 341, 358. Lord Kyllachy, in speaking of evidence of secondary meaning, said:

"I have first to consider whether the Pursuers have established in point of fact that their whiskey is so known in the market as 'Dewar's whiskey' that their name has acquired in the market a secondary sense,—that is to say, that it no longer denotes,—as it did at first,—simply whiskey made or sold by a person of the name of Dewar, but de-

notes, and is understood to denote, whiskey made or sold by the Pursuers. I am not prepared to affirm that such a thing is impossible, or, what comes to the same thing, is incapable of proof. It may, perhaps, be possible to establish by evidence that in the market generally, or in a particular market, and as applied to particular goods, a surname or patronymic common, and known to be common, to a large number of persons means, and means only, the name of a particular trade. An analogous question has more than once occurred with respect to what is known as a descriptive name,—a name which denotes primarily some kind or quality of goods, but may yet be shown by evidence to denote in the market the goods of an individual or of a firm. And it may be admitted that here as there, such proof is possible. But, here as there, the proof is always and necessarily difficult; and it is difficult, among other reasons, for this reason, that it is so very easy on such a subject to produce a great deal of testimony not consciously false, and probably most distinct and emphatic, which is yet essentially loose, and almost always colored. In dealing with such testimony judges and juries are apt,—and I think rightly apt, to be skeptical. I had occasion to say something on this subject in a case which related to a descriptive name, and which ultimately went to the House of Lords,—the case of the *Cellular Clothing Company* (25 R. 198),—and I think a great deal of what I said there I might repeat here. In particular I might, I think, hazard the observation that, although it may be possible to establish, as against a person using his own name to describe his own goods, that his name is already so appropriated as to make such description unlawful, I do not myself know of any case in which the use

by a man of his own name has been successfully challenged,—except in circumstances which plainly involved fraud on the part of the user. I must, therefore, frankly say that, even if the Pursuers' evidence in this case stood unchallenged, and was entirely consistent, and did not involve, as it does involve, some manifest difficulties, I should have hesitated to treat the greater part of it as of much value. Like similar evidence to which I have had occasion to listen, it struck me as, for the most part, expressed too much 'by the card;' and, apart from the circumstance that it did not always distinguish between the period before and the period after the commencement of the present proceedings, it was certainly not less open than usual to the observation that, when witnesses are being examined as to what they understood or understand, or what other people understood or understand, there is always a good deal of room for the play of interest, of business connection, and generally of party spirit.

“Waiving, however, all general criticism, and giving the fullest effect to the Pursuers' evidence, there is, it seems to me, one fact which I think is acknowledged, and which is fatal to the Pursuers contention. Their whole case is rested on the notoriety (if I may use the expression in no offensive sense) which their name has of late years acquired,—particularly in London,—by reason of an organized and extensive and very costly system of advertising. Now I think it is admitted,—if not it is clearly proved,—that up to a quite recent date,—a date subsequent to the institution of these proceedings,—the Pursuers did not in this country advertise as 'Dewar's Whiskey,' but always advertised as 'Dewar's Perth Whiskey,' or sometimes a 'John

Dewar's Perth Whiskey.' They did so no doubt for an excellent reason, viz., that they desired to make their trade name really distinctive.' At all events for reasons good or bad, the name or description under which they did in fact advertise was what I have stated; and whatever may have been the soubriquet which their whiskey may have obtained, or by which it may have been described or known at numerous public house bars, yet, to the general public,—to persons purchasing it in the market,—it was, at all events at the date of this action, known as 'Dewar's Perth Whiskey' and nothing else. I cannot in these circumstances see how it is possible to affirm that the name 'Dewar' has acquired the alleged secondary sense, or that the mere use by the defendant of that name is *per se* presumably deceptive."

Schove v. Schmincke, 33 Ch. Div., 546, 55 L. T. (N. S.), 212, Chitty, J.:

"But these facts by themselves are insufficient to establish the plaintiff's case. Here is evidence given by persons conversant with the trade to the effect that the term 'Castle Album' is now understood in the trade to represent the plaintiff's goods; but several of the plaintiff's witnesses are silent on the subject, and some others who have made affidavits do not say more than that the term 'Castle Album' denotes the plaintiff's albums, and no others. This may mean that the term denotes the plaintiff's goods to the witnesses themselves, which is very probable and may be accepted as true, seeing that they are customers of the plaintiff, and have received from him all the Castle Albums they have bought. Thus, in their minds, the term would nat-

urally be associated with the plaintiff and goods of his manufacture or selection. But statements to this effect fall far short of the proposition which the plaintiff seeks to establish, namely, that the term is now accepted in the market generally as designating exclusively his goods. Opposed to the evidence of the plaintiff's witnesses is the evidence of a considerable body of respectable witnesses also conversant with the trade. Further, the plaintiff has been selling other albums of a similar character, but under different designations, such as 'The Lake Album,' 'The Old Saxon,' and 'The Marble;' and other dealers in or manufacturers of a similar article have been selling them under the designation of 'floral albums,' 'old London,' 'the Thames,' 'the Alexander,' and the like. All these albums are apparently similar to the albums in question, differing only, or mainly, in the pictures they contain; and the titles appear to be taken from the pictures, and to be descriptive of them. It is urged for the plaintiff that these terms are not descriptive of an album for photographs. They are not exclusively descriptive; few descriptions are so; but they are descriptive so far as they go, and serve to denote the difference between different sets of albums of the same class. It is obvious that any person is at liberty to make such albums with representations of castles, and it is a strong proposition to say that he is not at liberty to describe it as *a* Castle album, or *the* Castle album. Assuming that, in point of law, it is competent for the plaintiff to claim an exclusive right to this title or term, he can only do so by establishing incontrovertibly the proposition that the term has, by general use, come to be used in a secondary sense as an equivalent for, and to denote exclusively, his own goods; and much more

cogent evidence would be required than he has adduced in support of the custom. On the balance of evidence as it stands, and on the question of probable success or failure, at the trial, I refuse to grant the injunction. But I make the costs in the action."

In *Hommel v. Bauer & Co.*, 22 R. P. C., 43, 46, the following colloquy between Terrell, K. C., and Lord Justice Vaughan Williams is very instructive (p. 46):

"Terrell, K. C.: The evidence proves that the word 'Haematogen,' used alone, has acquired the secondary meaning of signifying Dr. Hommel's preparation. [Vaughan Williams, L. J.: It is a question of degree in every case. Speaking for myself, if I was told that a certain volume well known to the legal profession was asked for sometimes as 'Annual Practice' and sometimes as 'Snow & Burney's Annual Practice,' I should hesitate to say that the words 'Annual Practice' had the secondary meaning of 'Snow & Burney's'.] The evidence here satisfies the test explained in *Reddaway v. Banham*, 13 R. P. C., 218; L. R. (1896) App. Cas., 199. [Vaughan Williams, L. J.: The more descriptive the word is, the more difficult it is to prove a secondary meaning.] True, but that is a question of degree, and the plaintiff here is in a very much stronger position than in the '*Camel Hair Belting*' or '*Cellular Clothing*.' This word 'Haematogen' is only to be found in scientific dictionaries. [Vaughan Williams, L. J.: But you have to displace the primary meaning, for, as long as that continues in the particular area to be affected, you cannot say that the secondary meaning is established.]"

In deciding the case for the defendants, Lord Justice Vaughan Williams said (46):

“The ultimate conclusion which Mr. Justice Warrington arrived at appears in his judgment when he says: ‘The conclusion I come to on the facts is that in this case the word ‘Haematogen’ has not obtained the secondary meaning which has been alleged; that it means a preparation for forming blood; and that I cannot regard the statements of the doctors and the other skilled witnesses who alone state that the name means Dr. Hommel’s production, as sufficient evidence to establish the secondary meaning in the face of the remarks of Lord Davey, and, I may add, of the other noble Lords, in the *Cellular Clothing* case in the House of Lords.’ I agree with the conclusion of fact which is arrived at by Mr. Justice Warrington. I do not doubt that for the particular class of persons who would principally have to deal with this preparation, doctors and chemists, this word ‘Haematogen’ has a meaning quite independent of Dr. Hommel’s preparation. It has a primary meaning, and we only have to consider whether it has acquired such a secondary [47] meaning as that, in the minds of that class of persons who have to deal with preparations of this sort, it would be taken to mean exclusively Dr. Hommel’s preparation. I do not understand that either Mr. Terrell or Mr. Sebastian go the length of saying that, immediately the plaintiff attached his name to it’s preparation, it would have been possible to say that the word ‘Haematogen’ thereupon acquired a secondary meaning, because at that moment there was no other preparation in the market to which this word, which has a pri-

mary meaning, had been applied. It seems to me it would be impossible to maintain such a proposition. What they do maintain is this: 'That in course of time, since, I think it is said, 1893, or somewhere thereabouts, this particular preparation has come to be well known and popular, and that gradually the word 'Haematogen' has come to be applied exclusively to the Plaintiff's preparation, and that it would be misleading those who had to do with chemical preparations of this sort if persons who make other preparations for the same purpose, but with a different analysis, were entitled to employ this name. I wish to say about this, first, that, if you look at the oral evidence which was given by the doctors, it is really a true summary of that evidence to say that the doctors sometimes call it 'Haematogen,' and sometimes call it Dr. Hummel's 'Haematogen.' I do not think that that evidence is sufficient to establish that which I ought not to allow to be very easily established on sight evidence, that this word has acquired such a secondary meaning that, in the trade, if I may use such an expression, it exclusively means Dr. Hommel's preparation. ***

[48] "In all these cases if the primary meaning of a word is a simple and easy primary meaning, known to everybody, it is extremely difficult to establish that, in any particular trade, this word has lost its well known and original meaning, and, in that trade, acquired a secondary meaning to the exclusion of the natural and original meaning of the word. *** I entirely agree with the conclusion of Mr. Justice Warrington that the primary meaning of this word has not been excuded, and it has

not acquired a secondary meaning which attaches in the trade to the Plaintiff's goods exclusively. I think that this appeal ought to be dismissed with costs." [Same case below, 21 R. P. C. 587.]

Bile Bean Manufacturing Company vs. Davidson,
23 R. P. C. 725-732:

"The onus is on the Complainers to prove that the words 'Bile Beans' have been appropriated in the market to their goods. In this case the market is the whole English public, and the Complainers have to prove that 'Bile Bean' has no meaning for the public but their goods. The words are to be taken together as explaining each other. Both are common English words. 'Bean' describes not only a seed, but, by derivative use, anything of a roughly ellipsoidal shape, as a piece of coal or iron ore (*Murray's Dictionary*, Ed. 1888). 'Bile' is a descriptive adjective which makes it clear in which of its possible senses 'Bean' is, in this case, to be used. The Complainers themselves, in their advertisements, say that a 'Bile Bean' simply means a bean for the bile. The ordinary English will sense the meaning at once. (*Van Duser's Trade-Mark*, 4 R. P. C. 31; L. R., 34; C. D., 623.) A generic name is not capable of being appropriated as a trade name. This has been frequently held in Scotland. (*Montgomerie v. Donald & Co.*, 11 R. 506; *Stuart & Co. v. Scottish Val De Travelers Paving Co. Ltd.*, 13 R., 1.). The Complainers must prove that 'Bile Bean' is capable of denoting only the pills sold by them and no others. (*John Dewar & Sons, Ltd. v. J. H. Dewar*, 17 R. P. C., 341). Here no evidence at all has been brought of the understanding of the pub-

lic. 'The evidence has all been dealers' evidence only, and this will not be enough where the market is the whole public (*Cellular Clothing Company v. Maxton & Murray*, *ubi supra*.) There is therefore nothing to displace the *a priori* meaning of the words 'Bile Bean' as pills for billiousness. If they are ever thus used as a common English description of goods, they are incapable of acquiring a secondary meaning in the sense that the mere use of the words involves a representation that the goods are those of a certain manufacturer, (*Cellular Clothing Company v. Maxton & Murray*, *supra*.) The principle of this case has been frequently followed (*Parsons v. Gillespie*, 15 R. P. C., 57; L. R. [1898] App. Cas., 239; *Ripley v. Griffiths*, 19 R. P. C., 590; *Fels v. Hadley & Co., Ltd.*, 20 R. P. C., 347, 21 R. P. C., 91; *Hommell v. Gebruder Bauer & Co.*, 21 R. P. C., 576; and *Wotherspoon & Co. v. Gray & Co.*, 2 M., 38) In these cases it was held that such phrases as 'Flaked Oats,' 'Oval Blue,' 'Naptha Soap' and 'Haematogen,' being purely descriptive words, had not acquired secondary meaning. Any reference to the nature or quality of the goods is descriptive, *e. g.*, 'Desiccated' Soup.' (*King & Co. Ltd. v. Gillard & Co. Ltd.*, 21 R. P. C., 589; 22 R. P. C., 327). 'There is no case the other way.'

William Stevens, Ltd., vs. *Cassell & Company, Ltd.*, 30 R. P. C., 199, decided by the High Court of Justice, Chancery Division, February 6th., 1913, Neville, J. (page 203):

"In this case I think that the Plaintiffs show no title to relief. It is undoubtedly a matter of importance to protect a trader from any unfair at-

tempt to take advantage of his reputation, but it is, I think, equally important to protect all His Majesty's subjects in their right to use the King's English, and the law will not recognize a monopoly of English words of common import.

“What is the present case? It amounts in effect to a claim to the exclusive use of the words ‘Magazine of Fiction,’ in connection, at all events, with ephemeral literature of the kind before me. It is to be observed that the words a monopoly in the use of which is claimed, are purely descriptive words. If you have a magazine, and that magazine contains nothing but fiction, I find a great deal of difficulty in suggesting to anybody who desires to describe the contents of such a magazine any other, or, at all events, any better, form of words than ‘Magazine of Fiction.’ I have to deal with two magazines; one is a magazine which has long been before the public and known as ‘Cassell’s Magazine.’ Sometime, not very long ago, the publishers were minded to indicate to the public more precisely what the contents of this magazine might be. I do not know what motive induced them to do it, but probably the large increase in facilities for reading, accompanied, as I fear it is, by a stationary development of brain, has led to an ever increasing demand for what is termed ‘light literature,’ and it may be that the words that Messrs. Cassell have added, which are ‘of Fiction and Popular Literature,’ may have been added lest any one should think that they would be likely to find matter of value within the covers of the magazine. Anyhow, that is the addition that has been made, and I have the magazine before me, which, on the face of it,

conspicuously declares that it is 'Cassell's Magazine of Fiction and Popular Literature.' This is said to infringe the right of Messrs. Stevens, Ltd., who have for a long time passed produced the magazine which bears the words 'Magazine of Fiction' upon it. I am quite willing to give Messrs. Stevens the credit of having obtained a considerable reputation in regard to this magazine, and to believe that a great many people know of the 'Magazine of Fiction' whether in its monthly form, or in its double form, or in its special form; but it is going a long way from that to suggest that no other firm in the world is entitled to describe the contents of their magazine in the only natural and appropriate way in which I think they can describe them if they are minded to indicate what the contents may be.

"It is, I suppose, suggested that the statement on 'Cassell's Magazine' that it is a 'Magazine of Fiction and Popular Literature' may lead to some confusion, and result in persons who are desirous of purchasing the 'Monthly Magazine of Fiction' with which they are familiar being put off with 'Cassell's Magazine' under the impression that it is the article with which they are familiar and which they desire to get. To me it is wholly incredible that anything of the kind could happen. ***

"What is the evidence upon which I am asked to find that no man but the Plaintiff has the right to put upon his magazine the words 'of Fiction' or that the name 'Cassell's Magazine,' with the addition of 'of Fiction and Popular Literature,' may not be used? It is this, that there have been a great number of successful instances of what are known as trap orders. Men and women have been sent

around to ask sometimes for 'Magazine of Fiction,' sometimes for 'the Magazine of Fiction,' and sometimes for 'The Monthly Magazine of Fiction,' to see if by chance they may not be given 'Cassell's Magazine' in response, and in a very considerable number of cases they have been. I think the motive which induced the vendor in each case to do this appears pretty clearly from the evidence which I have heard. In most cases the vendors, perhaps not unnaturally, think that when asked for a 'Magazine of Fiction' or 'The Magazine of Fiction' that any 'Magazine of Fiction' will do; but their motive always has been that, if they could sell a 5 *d.* article, they would a great deal sooner do so than sell a 3 *d.* article. But there is not a trace of evidence that anybody has been deceived, nor do I think if you waited ten years would you find a single instance in which a persons who desired to get the 'Monthly Magazine of Fiction,' would take a 'Cassell's Magazine.'

"I find, therefore, that there is no basis for, or substance, in the Plaintiff's action, and it must be dismissed with costs."

Ripley v. Griffiths, 19 R. P. C., 590, 593. Farwell, J.:

"This is an action brought by Mr. Ripley, who claims to have the exclusive right to the use of the word 'Oval Blue,' and he sues the defendant on the ground that she has passed off goods not being of his manufacture as his goods by selling the same in answer to orders for 'Oval Blue.' The principles upon which the court acts in such cases are really so well settled that it is hardly necessary

for me to refer to them at all. 'This is a case of the usual kind,—an appeal to the court to protect a man from having his property affected by somebody else passing off goods not being his goods as his goods. The two issues of fact,—and those cases are really all questions of fact,—that I have to determine are, first of all, do the words 'Oval Blue' mean Ripley's manufacture and nothing else? Secondly, if so, has the defendant, by herself or her agent,—in this case it is her daughter in her shop,—in fact passed off goods not being the plaintiff's goods as his goods?

"Now it is to be remembered that the plaintiff in this case is relying simply upon the words 'Oval Blue.' There is no question of Trade-Mark; there is no question of get-up or the general appearance of the article sold. It is simply that the words 'Oval Blue,' according to the plaintiff's case, mean Ripley's blue and nothing else. The article sold is blue, which is a well known laundry material, and that is the only name describing it. The articles are sold in oval form. It is an absolutely accurate description of the goods as sold both by the plaintiff, and, also, in this particular case, by the defendant, in that the goods that she sold were oval cakes made of blue,—put shortly, 'Oval blue.' The plaintiff, therefore, has set himself the task of showing that he has acquired the two common words in the English language, 'Oval Blue,' which accurately describe the articles sold, as his own property."

And, after giving an abstract of the testimony, the court concluded [596.] :

“That is all the evidence on that issue, and, to my mind, it stops very far short of the discharge of that burden which Lord Davey says is not impossible but extremely difficult to discharge, and which Lord Shand, in the same case, evidently thought was practically impossible to discharge, namely, to show that words, purely descriptive and in common use in the English language, accurately describing the articles sold, can be acquired by a man on the evidence that he has alone for several years made articles of that shape and sold them under those words. It seems to me that on that issue the plaintiff entirely fails, and has not made out his claim to a monopoly of the words ‘Oval Blue.’ ”

Fels v. Hedley & Co., 20 R. P. C., 437, 422, Byrne, J.:

“The first question is, has the descriptive name of ‘Naptha’ acquired in the market a secondary meaning denoting the goods of the Plaintiffs to the exclusion of all other makers of soaps? I do not think the Plaintiffs have succeeded in proving this.”

In *Fels v. Stephenson Bros.*, 20 R. P. C., 446, Mr. Justice Kekewich, speaking of the word ‘Naptha’, said:

“The question to begin with is—Is it descriptive of the plaintiff’s soap? Then, having found that it is descriptive, and about that I entertain no doubt, the question is,—and I adopt some language of Mr. Justice Byrne’s judgment, but it is language to be found in one form or another in many of the cases, Has that descriptive term acquired a secondary meaning denoting the plaintiff’s goods? That is a pure question of fact. ***

“I gather from Mr. Justice Byrne’s judgment that the evidence before him in favor of the exclusive use of ‘Naptha Soap’,—that is to say, ‘Naptha Soap’ apart from ‘Fels’,—was stronger before him than it is before me as far as I appreciate it, but, nevertheless, he came to the conclusion that there had been no appropriation of the word, to use a term which was adopted by Mr. Neville in his reply, or to put it, I think, more accurately, no acquisition of a secondary meaning. To my mind, the evidence before me is extremely weak. I have no doubt that people do frequently ask for ‘Naptha Soap.’ Many of the witnesses I have seen did do so, and many of the witnesses I have seen testified to it having been asked for as ‘Naptha Soap,’ but there is nothing to my mind approaching a universal use, or even, I should say, what Mr. Justice Byrne calls an extensive use, of the term. It was known as ‘Fels-Naptha Soap;’ it was known, of course, also, as ‘Naptha Soap,’ because there was no other, but it was generally known as ‘Fels-Naptha Soap.’ Fels were known as the manufacturers of this particular soap called ‘Naptha Soap,’ and it was asked for and sold in connection with Fels, and not necessarily and simply as ‘Naptha Soap.’ I repeat that, to my mind, on that part of the case, having seen the witnesses, and balanced their evidence as well as I can, the plaintiffs’ case is extremely weak. I agree, entirely, on the evidence before me, with the conclusion which Mr. Justice Byrne arrived at on the evidence before him, that the plaintiffs have not established a right to this particular name, ‘Naptha Soap,’ and that it has not acquired, or had not acquired in August, 1902, a secondary meaning so as to denote the goods of the plaintiffs and to prevent

other persons from using that name for the sale of their goods. There must, therefore, be judgment for the defendants with costs."

Fels v. Thomas, 20 R. P. C., 447 (another case involving the word "Naphtha" for soap), Kekewich, J. (449):

"It is not my wish to treat with impatience, still less with contempt, any point which it put forward by counsel, and, therefore, I think it right to explain why, to my mind, the evidence to which I have just listened is of no importance,—I had almost said irrelevant. The plaintiffs come here to establish the right to a trade name, namely, 'Naphtha Soap.' They either succeed or fail in that. According to my judgment, they fail. Of course, if they succeed in that, there can be no question whether the soap put on the market by the defendants is really naphtha soap or not. It does not arise; and on that hypothesis the evidence is irrelevant in the result. But suppose the other case, which in my judgment is the right one, is the result, and the plaintiffs fail in establishing their trade name. They come here and say, 'At any rate we sell genuine naphtha soap. We have proved by our analysis that there is naphtha in substantial quantities in our soap; we put it on the market as not only containing naphtha, but containing naphtha in such quantities as to be of very great service as a detergent (I think that is the proper phrase) and that is the great advantage of our soap; now we have a right to complain of other persons selling soap which does not contain naphtha at all, or only a trace, or only something which, if properly called naphtha, at any rate is of

no use as a detergent.' In one sense they have a right to complain. We have all a right to complain of goods being put on the market which are not what they profess to be. It is to the public advantage that goods should be described as what they are, not as what they are not; but what right can that give to the plaintiffs to sue in this court for an injunction? It seems to me impossible that they can establish a right to an injunction to prevent others selling anything as 'Naptha Soap' if they themselves have not got the right to claim 'Naptha Soap' as their own name. Supposing the defendants sell something which is not soap and call it 'Naptha Soap.' Why not? It may be very foolish. It may even be wrong. It may leave them open to some other proceedings under some statute, into which I do not inquire, of course, but what right have the plaintiffs to complain of the use either of the word 'Naptha' or 'Soap.' It seems to me that on the hypothesis that the plaintiffs have not established their right to 'Naptha Soap,' the evidence must be irrelevant to any question that can possibly be raised on the action. I thought it right to express my view, because I understand that the plaintiff's counsel do attribute some importance to it, and, as the question is going before the Court of Appeals, they are entitled to my judgment. Having said that, judgment will be given, according to the arrangement about the evidence, for the defendants with costs."

All of these cases were appealed (21 R. P. C., 85, 89, 95).

Fels v. Thomas, 21 R. P. C., 85, Vaughan Williams, L. J., [88]:

“Presently there came other soaps on the market,—I do not mean the defendants’ soap, but ‘Rock Oil Soap,’ and some other soap,—I forgot what the name of it was. The evidence is that as soon as ever these other soaps came into the market, then, when the retailers dealing in that soap were asked for ‘Naptha Soap,’ they would say to their customers, ‘Which “Naptha Soap” would you like,—Fels,’ ‘Thomas’ or Stephenson’s?’ This shows conclusively in the mind, at all events, of those retailers, ‘Naptha Soap’ had not become especially appropriated to soap of the plaintiffs’ manufacture. The moment that one comes to that conclusion, the next conclusion that follows on that is almost consequential. If the name had not become so appropriated, imitation for the purpose of passing off goods becomes proportionately improbable, and, under these circumstances, I have no hesitation whatever myself in finding the fact, which, as I understand, Mr. Justice Byrne and Mr. Justice Kekewich both found, that the name ‘Naptha’ was not used by the defendants for the purpose of imitation of the plaintiff’s soap, with the object of passing off the defendants’ soap as being of the plaintiff’s manufacture.”

Fels v. Stephenson, 21 R. P. C., 88, 89, Romer, L. J.:

“During that time, before other manufacturers in this country prepared and sold naptha soap, the customers, who knew the plaintiffs’ soap and liked it, not unnaturally then asked for it as ‘Naptha

Soap' simply, and, of course, there being no other manufacturer's soap on the market, when they spoke of the soap as 'Naptha' they meant the plaintiffs' and nobody else's soap. Of course they could at that time have meant nobody else's soap, but such evidence as that, and the evidence generally that we have in this case, is to my mind wholly insufficient to enable this court to say that what was originally a purely descriptive term has acquired a secondary signification, so as to give the plaintiff a sort of proprietary right in the term,—a right to say that nobody else can, without risk of having their goods said to be calculated to deceive, sell soap under the name 'Naptha' in this country. No such secondary signification of the term 'Naptha' has been proved to exist in this case, and, that being so, the basis on which the plaintiffs' case in this action was framed falls to the ground. I need scarcely say that there is nothing in the case, to my mind, which would enable the plaintiffs' case to acquire a different position, because they seek to make out, with more or less success, that the defendants' soap contains very little, if any, real naptha in it. It appears to me that that is an irrelevant factor under the circumstances."

S. Chivers & Sons v. S. Chivers & Co., Ltd., 17 R. P. C., 421.

S. Chivers & Sons had carried on business as jam manufacturers at Histon, in Cambridgeshire, since 1873. In 1888 they began to make table jelly. Samuel Chivers, of Cardiff, commenced making jam in 1877. In 1880 he took Padfield into partnership, and they carried on business as S. Chivers & Co. In 1895 they

were incorporated as a company under the style of S Chivers & Co., Ltd. In 1898 they began making table jelly. In 1900 S. Chivers & Sons brought an action to restrain S. Chivers & Co., Ltd., from using the style "S. Chivers" or the word "Chivers" as descriptive of their table jelly, or from using the said style or word for their table jelly without clearly distinguishing such table jelly from that of the plaintiffs.

It was contended that the name "Chivers" had acquired a secondary meaning. Mr. Justice Farwell discusses the nature of the proof necessary to establish secondary meaning [429]:

"It is not enough, in my opinion, for a man to say that he has been the only manufacturer of his name of a particular article, and that his customers, therefore, necessarily only know that article, and that no one else of that name having ever traded in that article, there can be no other under which that article can be sold except his own, and, therefore, he has a right to the sole use of that particular name. It appears to me that the issue thrown upon the plaintiff in a case of this sort is to prove that the world has come to know that particular article associated with his name as meaning his manufacture, and that only. When I say 'the world' I am using another phrase similar to that used by Lord Shand. I do not, of course, mean every human being in the Kingdom, but I mean all persons whom it in any way concerns. A man's own customers know his own jelly, and do not know other people's because they have never troubled themselves to ascertain whether there were such other

persons at all. But in order to give the name 'Chivers' Jelly' that secondary signification which the plaintiffs desire to attach to it, and not to make it mean simply a jelly made by a person of the name of Chivers, they must, in my judgment, show first of all that that user has been locally universal, at any rate in the sense that it extends in any locality over the area in which the defendant has traded. If it were necessary for the decision of this case, I should hold myself that the universality really must be coextensive, at any rate, with England and Wales. I leave out Scotland because there is a different system of jurisprudence there, and it might not be necessary to show that it extended to Scotland, but I think you must at least show that the universality was such that it extended to England and Wales for this reason: it would be intolerable, to my mind, to allow a man by simply trading in the eastern counties, say, to acquire for himself a monopoly in his own name. The gist of it, as decided in *Reddaway v. Banham*, is that you take out of the dictionary of the English language, for the purpose of a particular trade, a word which bears a primary signification, and you attach to that word in the dictionary a secondary signification. To say that can be done at all is, I agree with Lord Shand, a very great step. But when you have once the finding of a jury, as you have in *Reddaway's* case, that it had in fact been done with those words, it seems to me the law follows as a matter of course. The real difficulty is the finding of fact. Speaking for myself, I should never find the fact to be that the word had obtained that secondary signification unless it was proved to my satisfaction that the use had been locally universal in the sense I have at-

tached to it,—universal in point of space. I think Lord Halsbury also would certainly not have decided *Reddaway's* case as he did otherwise than on the facts found, because he expressly guards himself by saying that it is a question of fact. If it is found as a fact that the words 'Camel-hair belting' have ceased to mean belting made of camel's hair, and have come to mean for all persons whom it concerns to know it,—all persons in the trade and all persons buying camel-hair belting,—the belting made by Reddaways, and not belting made of camel-hair, the law follows as a matter of course. In that particular case the defendant had put himself in the position of rendering it impossible for him to be heard to say that it had not that signification because of a letter he had written which showed, as against himself, that he knew quite well that it had. That particular case, in my judgment, is a question solely of fact. I must not say it was unarguable, in view of the decision in the Court of Appeals, but it does, with all respect, appear to me to be a perfectly plain case, when the facts have been stated. I think the Court of Appeal rebelled against the finding of fact in the view they took, and why they were reversed was because they would not acquiesce in the finding of fact.

“Further, there is another point which appears to me most material on the question of universality, and that is, that the name should have to the whole of the trade and to all persons who have any knowledge of the article in question, the sole meaning sought to be attached to it by the plaintiffs,—that is to say, the original primary meaning must have been eliminated from the dictionary of the persons who deal in this article in the trade and all other

persons whom it may concern to know. Now, how do I find the evidence stands as regards that in the present case. Taking first of all the plaintiff's own evidence,—and Mr. Hughes has referred me this morning to the evidence given by several witnesses. Without going through them in detail, as he has so recently called my attention to them, it appears to me that is fatal to his case. All his expert witnesses,—I think I may say all of them, but at any rate the large majority of them,—said when they looked at E. J. C. 3,—that is, the defendants' packet,—‘If I saw this I should not be deceived.’ It seems to me that, in order that the plaintiffs may succeed, they must have called a body of witnesses, who would have said: ‘When I saw that packet the word “Chivers” on it told me at once, whatever the rest of it may be, whatever the colors may be, whatever the other statements may be, that that was the jelly manufactured by the plaintiff Chivers, and nobody else.’ That is the meaning of saying that the word ‘Chivers’ has obtained, as applied to jelly, a secondary meaning in the English language, so that the primary meaning is excluded. It is not enough to say that the plaintiffs' customers, who have known Chivers as the only person who has made table jelly and sold it under the name of ‘Chivers,’ know him as the only ‘Chivers’ selling. If it were not so, a man after a year's trading would probably say: ‘I am the only person of the name of Chivers selling jelly; nobody else can do it because I am known to the customers as the sole maker and vendor of “Chivers’ Jelly.”’ That is not the meaning of the alteration of the signification of the word. It must be, to use Lord Shand's word, ‘universal.’ It must be such that any member

of the trade, and any member of the public, with sufficient knowledge of what he wants, must be able to say at once, looking at the wrapper, 'When I say the word "Civers" I should assume that to be the plaintiffs' manufacture.' So far from that being the case, the plaintiffs' witnesses,—at any rate the expert witnesses,—said, 'I should not be deceived,' and one of them absolutely ridiculed the idea of his being deceived. This is strongly confirmed by the defendants' witnesses, and I wish to refer in a little detail to the evidence given by Ballard and Lewis, because of the comments which Mr. Hughes has made upon their evidence. Ballard said: 'If a customer asked me for "Chivers' Jelly I should sell what I had in stock. If I had both I should ask him which he required.' He said the same with regard to jams, and I pause here to observe that it appears to me that, if the plaintiff could succeed as regards jelly, he could also succeed as regards jams, although in this particular case the defendant has been trading in jams for at least fifteen years. Lewis said the same thing: 'If asked for "Chivers' Jelly," I should give the defendants'. If I had both, I should ask which was wanted.' Mr. Hughes asks me to say that only shows how easily you can defraud and deceive the public, and that would be right if he had proved his case; but I use this evidence to show that he has not proved his case, and he fails to prove it because, unless I say both these men are dishonest, they have disproved the plaintiffs' case. They appeared to give their evidence as honest men, and not as though they were thinking, as possibly might be said of one of the other witnesses, of being very smart; they gave their evidence in a very straightforward manner,

dealing with it as a matter of business as they thought they were doing, and not as anything sharp, and certainly not anything dishonest, and unless the plaintiffs' name has acquired the secondary signification which he desires to attach to it, they were perfectly right in the course they pursued. If he had proved that he had got that 'universal' user of the name which he desires me to hold that he has, then these two persons would be guilty of dishonest conduct in that which they say would be their ordinary course. It appears to me that the fact that they were wholly unconscious that there was any dishonesty in the matter shows strongly that they, at any rate, did not understand, if anybody asked for 'Chivers' Jelly,' that they could mean anything but the plaintiff 'Chivers' Jelly.' It has also been put by Mr. Hughes,—and I must advert to it, although perhaps it is not necessary for the purpose of my judgment,—he has pressed upon me the large amount spent by the plaintiff on advertisement. He says that by advertising the world gets to know of Chivers. The logical result of that would be that if a London tradesman, dealing only in London before he got any trade in the country at all, chooses to disfigure the fairest landscape in the kingdom by the atrocious act of advertising, he would obtain for himself, having by that means forced it upon public attention, a monopoly of the use of the name which he has thrust upon the eyes of all passengers by railway. Advertisement, distinguished from trade, is nothing. No doubt if you have the trade the advertisement assists the trade, but to say that a man can by advertising alone make his name known in connection with particular goods so as to assist him in obtaining a monopoly

of the goods, seems to be untenable as a proposition.”

Wurm v. Webster, 21 R. P. C., 373. In this case plaintiff claimed that the words “White Vinnese Band,” applied to his organization, had acquired a secondary meaning.

Mr. Justice Kekewich [376.] :

“Notwithstanding the numerous questions which have been raised and discussed in the course of this trial, I think the case may very well be disposed of on one ground. The real issue is whether the title of the plaintiff’s band, whatever that title may be, has acquired a secondary meaning, so that it is now known as his band without the use of his name, and that, when that title is used, everyone who ought to know at once recognizes that the plaintiff’s band is referred to, and no other. That is what I understand is intended by a secondary meaning. I say everyone who ought to know, because it cannot be supposed,—and was not supposed in the cases which have been referred to,—the *Stone Ale case* and the *Yorkshire Relish case*, and others,—that all the world knows, and that it is universally known. It is only known to those who, either from the trade or from their habits, would be likely to know.

“First, I have to ask what is the title of the plaintiff’s band? He put forward in his statement of claim,—and he adhered to it in his answer to interrogatories,—three alternative titles, first, ‘The White Viennese Band,’ which I may say at once, to save repetition, may be taken to be synonymous

with the 'Viennese White Band'; secondly, 'The White Hungarian Band;' and thirdly, 'The White Band.' It would have been practically impossible for him to have succeeded in that claim, because I think it is inconceivable, according to my knowledge of the world and the use of language, that the plaintiff could have proved that the three titles of his band had all acquired secondary meanings so as to denote his band and his band only. The plaintiff's counsel discreetly gave up at once 'The White Hungarian Band,' and, at the conclusion of the plaintiff's evidence, he also gave up 'The White Band,' with, if I might say so, equal discretion. It was certainly the weakest of the lot. Again I cannot conceive it practically possible that anyone could establish a title to 'The White Band,' so that nobody else could call their band 'White.' However, we have got those two out of the way, and I need say no more about them.

"The question is whether the title 'The White Viennese Band' has acquired a secondary meaning, so that among those who ought to know, and who have opportunities of knowing, who deal with bands in one way or another, would at once conclude, when they heard the phrase 'The White Viennese Band,' that the plaintiff's band, and no other, was intended. That, to my mind, is the issue.

"I have heard a great deal about the difference between Viennese music and other music, as to whether there is a conductor, or a leader, or a leader who sometimes conducts. All that seems to me to be, I will not say beside any question, but beside the question which I have to decide. The point on which I propose to dispose of this case is this:

The plaintiff has not proved to my satisfaction that his band is known by the name of 'The White Viennese Band,' or has been known by that title so as to give it an opportunity of acquiring a secondary meaning. My conclusion on the evidence is that the plaintiff's band has been known, and is known generally, as 'Herr Wurm's White Viennese Band,' and that the prefix of his name is really required in order to identify his band. I put aside altogether all the evidence respecting the ordinary prefix or addition of the conductor's name. Probably in a large number of cases you would find the conductor's name published with the title of the band, more, perhaps, as an advertisement of the conductor himself, and partly, also, of course, to intimate to those who are likely to hear it that the band will be conducted by somebody who has a claim to be famous. I put all that aside, I am dealing with the pure question of fact. Mr. Warington, in reply, has replied, as of course he necessarily would, on the evidence which he has called to show, that 'The White Viennese Band' is understood by many people to mean the plaintiff's band, and he has also, of course, called attention to the absence of evidence the other way. Necessarily there was an absence of evidence on the other side, because it would have been purely negative, and would have been of no avail. I take such distinguished witnesses as Lady Jeune, Lord Pembroke, and Sir George Faudel Phillips. They have employed the plaintiff; they know him well, and they know how excellent his band is. About that there seems to be no doubt at all, and particularly when it is conducted or led by himself. They know that they are asking for; they know of no other White Viennese Band. Really that is all their evidence comes to at all.

“On the other hand, I have a large body of evidence pointing to the conclusion that the band is described and known generally, as the plaintiff himself invariably describes it in all the letters I have seen, as ‘Herr Wurm’s White Viennese Band.’ Then remarks have been made on the character of the witnesses, that they are all interested in opening the door for the multiplication of bands. This is perfectly true, but I have had before me a number of witnesses whose veracity I have no reason to doubt at all, and some of whom are extremely pointed. I do not think it necessary to name any but one. I have heard Mr. Edwards, the manager of Chappell’s entertainment department, a gentleman of large experience, who gave his evidence remarkably well, and he not only produced letters, but told me what he himself knew on the matter, and he told me,—what others have told me,—that if he is asked for ‘The White Viennese Band,’ he would say which? Witness after witness has told me the same story. It is not recognized in the trade as necessarily meaning the plaintiff’s band, and it is in the trade to which you must look; because it is not only among the people who go to listen, or the people who engage the band for the entertainment of themselves and their friends, but the reputation must be obtained among those who, as agents and as managers of entertainment departments, have to provide a band when required by the inquiries at their offices. They all tell the same story. They very likely know, and they do know, many of them, that the plaintiff’s band is, I may say, the best,—at any rate,—the best known. They were very hesitating about any other White Viennese Band; they had heard of some, and it is very

difficult, I agreed, to find out if there is in existence, or has been, any distinct band called by that name, but still there is no denomination among them, no acquired name among them, such as White Viennese Band. They want something else to add to it.

“Then Mr. Warrington has called my attention to those cases in which the addition of the name of the proprietor did not prevent a secondary title being acquired. Certainly not. I do not say the addition of Herr Wurm’s name prevents the title acquiring a secondary meaning, but what I do say is that the secondary meaning has not been acquired without his name, that his name has been from first to last regarded as part of the title of his band, and that without it the title is not known in the sense in which I consider it ought to be known in order to acquire a secondary meaning.

“Let me repeat, I do not pretend to say everybody ought to know. You cannot prove universality, but before you can acquire a secondary meaning for your goods, or for a band, you must prove that among those who deal in such things, yours are generally known by the name which you set up. Among those who sell them, and those who buy them, whether it be ale or Yorkshire Relish, or a band, it is precisely the same story throughout; there must be that general familiarity with the title as describing a particular article, before you can arrive at a conclusion that the secondary meaning has been acquired. In my view it has not been acquired in this particular case. If that is right, there is no object or reason for going into any of the other items of passing off; I have not heard Mr. Dickson on the question, and therefore

perhaps I ought not to pronounce a decided opinion. But, as at present advised on the two points that have been raised, having formed a conclusion, I think I had better express it. First, as regards the use of the white uniform,—I know of no rule against any man, who wishes to send a band down to a wedding, or for any other occasion, to prevent his putting his performers into a white uniform. I do not know why, because the plaintiff uses gold lace, or blue cuffs and collars, another man should not do the same. They are open to all the world. I agree that if you see any other indication of attempting to pass off one band for another, then you may look to the uniform among other indications, and form your own conclusion upon it, but the use of the uniform alone seems to me to be quite defensible. As I have had occasion to say before in a case of this kind, it may not be good taste to take another man's uniform, any more than it is good taste to put coffee into blue tins with a certain amount of lettering very like your neighbor's, but still it is open to you to do so if you please.

“Then as regards the Winchester incident, there again, without prejudice to any argument on the part of the defendants, it seems to me that if the plaintiff had acquired the title which he says he has, there was an offense committed in the first instance certainly, if not all through, in good faith, without meaning to do any harm. Still I think an offense would have been committed against him, and that he would have been entitled to some relief against both defendants. But I dispose of that part of the case, as I do of the rest, by saying that he must first prove that he had a title which had acquired a secondary meaning. I hold that he had not, and

therefore the Winchester incident falls with the rest of the complaint. There must be judgment, therefore, for the defendants, with cost."

Imperial Tobacco Co. v. Purnell, 21 R. P. C. 368. This was a suit to restrain the use of a red band about cigars. Joyce, J. [371.] :

"Upon the evidence I am not satisfied that the use of a narrow red band, when adopted by the plaintiffs' predecessors, was novel or peculiar to them. I think such a band was probably used quite as early, if not earlier, by other people, if not by the defendant himself. He has certainly used it for many years, and it has been used at various times by different persons, though many of these have been intimidated, I think I may say, by the plaintiffs into giving it up.

"I do not doubt that the plaintiffs have used, and do use, a narrow red band to a greater extent than any other manufacturer; but this does not confer any exclusive right upon them. The only shadow of a foundation for the plaintiffs' claim is that the plaintiff's cigars, as it is alleged, have been occasionally asked for by persons, sometimes in jest, or sometimes, though I doubt it, because they were acquainted, or imperfectly acquainted, with the proper designation of these cigars, as a cigar with 'a red band' or 'narrow red band,' which no doubt it is. If, and so far as, the plaintiff's cigars have been asked for by 'a red band,' I think that is immaterial, for a red band is open to the trade. If, and so far as, they have been asked for by 'a narrow red band,' that is somewhat different, but I am of

the opinion that the extent to which this has been done has been very much exaggerated by some of the witnesses on behalf of the plaintiffs, and the fact of an article being occasionally asked for by a characteristic common to itself and others which is open to the trade, gives no right to a monopoly of that characteristic. I am of the opinion that a matter of one, or two, or three-sixteenths of an inch in difference in the width or narrowness of a band, which is open to the trade to use, cannot make the thing 'distinctive' in the sense in which that term is used in cases of this kind. In the present case the proper and sufficient distinction is in the name on the band.

"In my opinion the case is not like that of *Reddaway v. Banham* (12 R. P. C., 83; L. R. 1895, 1 Q. B., 286; 13 R. P. C., 218; L. R., 1896, App. Cas., 199) where the jury found that 'camel hair' belting meant belting made by the plaintiff, as distinguished from belting made by any other manufacturers, but it is more like the case of the *Cellular Clothing Company, Ltd. v. Maxton and Murray*, (15 R. P. C., 581; L. R., 1899, App. Cas., 326) where it was held that the word 'Cellular' was an ordinary English word which appropriately and conveniently described the cloth by which the goods sold by the respondents were manufactured, but the term had not been proved to have acquired a secondary or special meaning so as to denote only the goods of the appellants. If I am bound to state my opinion, I do state that it has not been proved in this case that the words 'narrow red band,' in connection with cigars, have acquired such a secondary or special meaning as to denote only the goods of the plaintiffs."

Aerators, Ltd., v. Tollit, 19 R. P. C., 418. Complainant sold carbonic gas in capsules called "Sparklets." Defendant, whose business was proposed to be the charging of large quantities of water, adopted the name "Automatic Aerator Patents, Ltd." This action was to restrain the use of the word "Aerator" in the name. Farwell, J. [419.] :

"It has been held that 'calculated to deceive' does not point to intentional fraud, but it is a question of fact in each case whether the name of the new company is so similar to that of the old company as to induce the belief that the two companies are identical. In considering this question it is material to ascertain: (1) What business has been, or is intended to be, carried on by the old company, and what is intended to be carried on by the new; (2) What sort of name has been adopted by the old company? As to the first point, I do not think that it is sufficient for an existing company to point to a clause in its memorandum which would enable it to extend its operations to numerous classes of trade unless it can satisfy the court that it either has carried on, or really proposes within a limited time to carry on, such a particular business. It cannot, I think, be enough in these days, when the objects of a company are usually limited only by the number of letters in the alphabet, and extend to every form of business, whether connected or not with the principal object, to show that the intended new company includes some similar objects; it is necessary to see whether the real objects of the company are similar. ***

“The plaintiffs further argue that the Act of Parliament was intended for the protection of the public, and that there must necessarily be some confusion in the minds of the public if the whole of their title is taken, but I would point out that the plaintiffs cannot assert in their own names the rights of the public,—that is for the Attorney-General; they can only assert their own rights as members of the public, if, and so far as, they can show special damage to themselves; but the choice of their own name rests with themselves; the registrar has not discretion to refuse to register any name put forward on behalf of a company, and if by any reason of their adoption of one single word in common use they run the risk of suffering injury they have only themselves to thank, and they can no more acquire a monopoly in the use of the word ‘Aerator’ by adopting that as their title than an individual can acquire a monopoly in his own name or the name of the article that he manufactures, as in the latter case it is necessary for the individual to show, not merely that the defendant is trading under his name or is making the articles the name of which he has adopted, but must also show that the name of those articles is exclusively identified with his own manufacture so as to have acquired a secondary meaning, so a company must also show that the name which *prima facie* refers to a number of persons or articles is in fact identified solely with them before they can satisfy the court that its use as part of another company’s name is calculated to deceive. A name is not necessarily calculated to deceive because it is similar; it must depend in a great measure upon what the nature of the name is, and if it merely represents the name of

th article supplied by the company, it would require very strong evidence to show that such name had lost its primary meaning and had become identified with the plaintiff company. ***

“In my opinion the plaintiff’s action is an attempt to monopolize, for the purpose of nomenclature, a word in ordinary use in the English language, and fails, and must be dismissed with costs.”

Wolff & Son vs. Nopitsch, et al., 17 R. P. C. 328, 330:

(June 20, 1900) Cozens-Hardy, J:

“ In substance, and part from form, what the Plaintiffs contend is that they are entitled to claim the words ‘Spanish Graphite,’ not as a trade-mark, because it is not registered as a trade-mark, but they are entitled to it in this sense, that it is so well known in the English market to indicate their goods that those words, when attached to goods of the same class by anybody else, must lead to the goods of the defendants being mistaken for the goods of the Plaintiffs and they seek an injunction on the old common law ground of an action of deceit. It is obvious, I think, that there are serious difficulties in their way. *** I am asked to say that from about the end of 1872 or 1873, when the first parcel of Spanish graphite was exhausted down to and including the year 1892, ‘Spanish Graphite’ did not **mean** graphite imported from Spain, but meant graphite produced anywhere else and prepared in a particular way by the Plaintiffs and so turned into pencils. I think that that is a contention which is almost a hopeless one. A name which originally began as a geographical term and which for more

than twenty years after its introduction is asserted to be a geographical term, cannot cease to be a geographical term and become merely descriptive of the goods of the manufacturer. The Plaintiffs' case must depend upon this, that the words 'Spanish Graphite' were known to the public,—not only to the wholesale trade but to the public,—as distinctive of their goods so that anybody who sees the words 'Spanish Graphite' would at once say, 'oh, that is Wolff's.'

**ANALYSIS OF PLAINTIFF'S TESTIMONY
AS TO "SECONDARY MEANING."**

While plaintiff has taken considerable testimony in an effort to establish a secondary meaning for "coke," and "dope," and all the other words, phrases and expressions that are used to describe the article which it and defendants manufacture,—while it has assiduously striven to establish a secondary meaning for the *idea* which these expressions primarily convey,—it has really produced very little evidence in support of its claim.

Altogether, plaintiff has introduced eighty-six witnesses to prove the point. Classified according to occupation, they are:

70 "trade witnesses.

6 of plaintiff's traveling salesmen.

5 of plaintiff's private detectives.

3 of plaintiff's bottlers.

1 of plaintiff's jobbers.

1 plaintiff's vice president and sales-manager.

The seventy "trade" witnesses are more specifically classified as follows:

- 34 druggists, all operating soda fountains.
- 13 soda dispensers.
- 13 proprietors of cigar stores having soda fountains (6 of whom are Greeks).
- 8 confectioners (3 being Greeks), 7 of whom have soda fountains, while the other handles "Coca-Cola" in bottles.
- 1 retail grocer, who handles "Coca-Cola" in bottles.
- 1 lunch-room proprietor, who has a soda fountain.

70

Grouped according to locality, these seventy "trade" witnesses may be further classified thus:

- 25 in Atlanta, Ga.
- 1 in Newnan, Ga.
- 8 in Mobile, Ala.
- 8 in New Orleans, La.
- 18 in Dallas, Texas.
- 3 in Dennizen, Texas.
- 2 in Pilot Point, Texas.
- 1 in Fort Worth, Texas.
- 1 in McKinney, Texas.
- 1 in Waco, Texas.
- 1 in Charleston, W. Va.
- 1 in Chicago.

70

The other witnesses, aside from plaintiff's salesmen, detectives, and vice president and salesmanager, are located as follows:

- 2 "Coca-Cola" bottlers, Murfreesboro, 'Tenn.
- 1 "Coca-Cola" bottler, Dallas, Texas.
- 1 "Coca-Cola" jobber, St. Louis.

4

The testimony of these eighty-six witnesses may be broadly grouped into two classes: (1) Those who testify that "coke," "dope," "shot-in-the-arm," etc., mean "Coca-Cola" and nothing else; (2) those who frankly admit that these words and phrases are used simply to describe the article in question, and are applied by the public to all drinks of that description regardless of their manufacture.

Those belonging to the first class are, of course, plaintiff's officer, one of its bottlers, its salesmen and detectives, and those of its "trade" witnesses who really do not know the article at all except as made by plaintiff. Those belonging to the second class are naturally, those who have some knowledge of the drink as manufactured by others. There is not one of these witnesses in either class who is not either directly or indirectly connected with plaintiff in a business way. The so-called "trade" witnesses are nothing more than plaintiff's agents,— "not agents in the strict sense of the word," to use the language of Parker, J., in *Burberry's v. J. C. Cording & Co.*, 26 R. P. C., 700, "but who buy the plaintiff's goods on special terms and re-sell either to the trade or public, and whose interest is to make their re-sales as large as may be." Not one of them handles any drink of the kind here in question except that of plaintiff's manu-

facture,—only eight have ever done so, and, of these, seven have purchased only a few gallons of the stuff to try it out and see what it was like, and, then, after a few days' trial, have, at plaintiff's solicitation, taken it out of their fountains and gone back to dispensing plaintiff's product exclusively, as they had always done before.

The remarkable thing about plaintiff's testimony is that, while the case it must make out is one of deception of the *ultimate purchaser*,—the *customers* of the *retail* stores; while it must prove that, to the man who *asks* for "coke" and "dope," etc., those words mean plaintiff's manufacture of the article thus described as distinguished from other manufactures of the same article,—not a member of the general public,—not a single "ultimate purchaser,"—has been called upon by plaintiff to give first hand information on the subject. Its witnesses are all more or less its agents, interested in varying degrees in its success, and, as pointed out by Lord Kyllachy in *Dewar v. Dewar*, 17 R. P. C., 358, their testimony is "certainly not less open than usual to the observation that, when witnesses are being examined as to what they understood or understand, or what other people understood or understand, there is always a great deal of room for the display of interest, or business connection, and generally of party spirit." "The proof," said Lord Kyllachy in the same case, "is always and necessarily difficult; and it is difficult, among other reasons, for this reason, that it is so very easy on such a subject to produce a great deal of testimony not consciously false, and probably most distinct and emphatic, which

is yet essentially loose, and almost always colored. In dealing with such testimony judges and juries are apt, —and I think rightly apt,—to be skeptical.”

But waving all general criticism, and taking up, first, plaintiff's trade witnesses (because if plaintiff cannot establish its case by them, it certainly cannot do so by its salesmen and detectives), and, in particular, those who say that, in their opinion, “coke,” “dope,” “eye-opener,” etc., mean “Coca-Cola,” it will be found, upon very slight analysis, that their testimony is of but little value. At best, it is but the inference which they drew from the facts that came within their observation at their particular establishments. If those facts do not justify the inference thus drawn, their testimony falls to the ground.

Those facts, broadly summarized, are:

Plaintiff, so far as they are aware, was the inventor and first producer of the drink. It adopted and used the words “Coca-Cola” as the name of its invention and advertised the article under that name throughout the length and breadth of the land. For years the article as manufactured by plaintiff was the only article of its kind known to them, and plaintiff was the only producer of that sort of drink they had ever heard of. Of course, there being no other similar drink in the market, so far as they knew, they handled only that manufactured by plaintiff. Their customers knew no other. Plaintiff enjoyed a complete monopoly, for ought they or their customers knew to the contrary. Because the drink was

prodigally advertised and universally known to be “stimulating,” “exhilarating,” and “invigorating,” and one that would “relieve fatigue,” because it was represented to be a “valuable brain tonic” and “nerve stimulant,” containing the tonic and nerve stimulant properties “of the wonderful coca plant and the famous cola nut,” and good for the cure of “headache and nervous exhaustion” and all similar ailments, and because these characteristics were due, and generally known to be due, to the presence in the drink of cocaine, or caffeine, or some “dope” of that character, certain elements of the public, with characteristic American wit, began to refer to the article as “coke,” and “dope,” and to ask for it by those and many other expressions having the same sinister signification, to distinguish the kind of drink desired from the other varieties of soft drinks usually carried at soda fountains,—that is, to describe the article. The description was accurate enough for the retail dealers and they sensed at once the sort of drink referred to. When customers who called for “coke,” or “dope,” or “cocaine,” or “caffeine,” or “poison,” or “shot-in-the-arm,” or who used any other expression of like import, were asked if they wanted “Coca-Cola,” they replied in the affirmative; if asked what they wanted, they said “Coca-Cola.” They knew no other drink of like character and had never known any other. As this particular type of drink was, so far as their information went, unknown to mankind until plaintiff, in its wisdom, invented it and placed it before a grateful public, the only name by which they knew the drink, and the only one by which they could describe it,—apart from any slang names for it,—was

the name, the plaintiff, its inventor, had given it, viz., "Coca-Cola." And, when asked what they meant by any of the slang expressions that in time became so prevalent, they replied, not unnaturally, that they wanted the drink which they knew no other way to describe than by the words with which plaintiff had described it to them,—“Coca-Cola.” They wanted a drink of the coca-cola kind, as distinguished, for example, from chocolate, strawberry or vanilla soda, and would have nothing else. When the only drink of that kind they had ever known, and the one they had drunk for years and become accustomed to, was served in response to requests for that sort of drink by any of the slang expressions alluded to, it was always found to give entire satisfaction and to be, apparently, the article desired. It was never refused on the ground that it was not what was asked for.

Bye and bye it dawned upon them that other manufacturers “had begun to experiment with the drink.” Within the last few years some of these “trade” witnesses have received circulars and advertising literature from concerns that professed to be making a drink similar in all respects to plaintiff’s. Some have occasionally seen advertisements in trade papers, or tacked on fences, of drinks with names ending in “Cola” or “Ola,” which they took to be “imitations” of plaintiff’s product. Others have been solicited by travelling salesmen representing other producers of the drink to place a trial order for the brands they carry and some of them have actually tasted the samples which the salesmen displayed, while

others have gone so far as to purchase a trial order and to dispense a few gallons of the stuff "to see how it would go." Still others have, at times, seen drinks of a similar nature marketed in bottles at baseball parks, fair grounds, and such places, and some of them have, on occasions, bought and drunk such drinks. Many of these dealers know, at this late day, in a more or less vague, indefinite sort of way, that perhaps there are "a few small concerns of the mushroom variety 'trying' to break" into the market with "cheap imitations" of plaintiff's product. But that is the extent of their knowledge that plaintiff has any rivals at all. They have never dealt in any drink of this description but those of plaintiff's manufacture, do not profess to know anything about "the cheap, unknown substitutes," and do not pretend to know how they are asked for in the establishments where they are sold. Plaintiff's manufacture is the only one they really know, and the only one they,—and certainly their customers,—ever have known, and it has dominated the market for so long a time, and to such an extent, that the comparatively insignificant activities of plaintiff's numerous but small competitors have failed to seriously impress them with the realization that plaintiff has not now, as they assumed it had for many years, a virtual monopoly.

These are the facts upon which plaintiff's "trade" witnesses of the first group in the above classification base their inference,—and that is all their testimony really amounts to, a mere *inference* on their part,—that "coke" and "dope" and all the other slang words

and phrases by which the article in question is usually described, have acquired a "secondary" meaning distinguishing, in the minds of all concerned, the drink, when made by *plaintiff*, from the *same drink* when made by *others*. There is not a suggestion by any of these dealers that their customers know even as much about the rival drinks as they, or for that matter, that they know there are any rivals. There is nothing to show that the words "Coca-Cola," even, mean anything to their customers but the name of the particular kind of commodity described thereby, or that even those words have acquired any secondary meaning distinguishing plaintiff as the maker of the commodity so described from all other makers of the same commodity,—much less that "coke" and "dope" and all the rest have acquired any such meaning. The words "Coca-Cola," being purely descriptive, and indicating primarily only a certain *kind* of commodity, could not mean anything but a description of the article to those who did not know there were other drinks of the same character in the market, but who only knew the drink as made by plaintiff. Hence, the evidence of those witnesses who said that they understood verbal requests for "coke," "dope," etc., to be equivalent to requests for "*Coca-Cola*," would not even tend to establish a secondary meaning for "coke," "dope," etc., unless it were shown that, to *those* witnesses, the words "*Coca-Cola*" meant something more than a mere description of the *kind* of commodity primarily indicated thereby,—that is, unless it were shown that, when they said "coke," "dope," etc., meant "*Cola-Cola*," they meant that those expressions meant *plaint-*

iff's manufacture of the article and not just merely the kind of article which the words "Coca-Cola describe,—in short, unless plaintiff had established a secondary meaning for the words "Coca-Cola" in the minds of those witnesses. Secondary meaning means *distinguishing* meaning. The distinction must be between goods of a similar character. If there are no goods of a similar character,—or what amounts to the same thing, if there are no goods of a similar character *known* to those who are called upon to express their opinion as to the trade meaning of descriptive words,—the words cannot *distinguish*, because there is *nothing to distinguish from*.

Burberry's v. C. J. Cording & Co., 26 R. P. C., 700:

"When a witness says he knows the word 'Slip-on' as meaning, not only a particular kind of coat, but the coat of a particular manufacturer, it is material to know whether he is acquainted with the article as made by any one else. If he is not, the word, however it may be associated in his mind with the particular manufacturer, is not really to him a distinctive word."

Kellogg's Toasted Corn Flakes Co. v. Quaker Oats Co., 235 Federal, 657, 665:

"Now, what significance have the facts thus pointed out? From 1898 to 1906 the predecessors of the appellant had a virtual monopoly of the food product in question, and, likewise, of the term, 'Sanitas 'Toasted Corn Flakes,' and so, inclusively, of the words 'Toasted Corn Flakes;' but this was only because, during that period, no one else was either

making or dealing in the article. The employment of descriptive words under such a condition of trade as this does not give to the words a secondary meaning denoting only the maker's product; evidence that such a meaning is so acquired is of slight value; this for the reason that in such circumstances the words could not refer to any product except the single and particular one so monopolized; and, consequently, the occasion for associating the words with the maker of the product does not arise as it must when two or more competitors are making and selling similar products."

A few typical extracts from the testimony of the class of "trade witnesses under discussion will serve to illustrate the general trend of their testimony. A complete review of the evidence will be found in the schedules.

I. V. WOOD, of Mobile, Ala., strikes the key-note of the whole contention that "coke," "dope," etc., have acquired a secondary meaning. He just took it for granted that these expressions are used to indicate the article plaintiff makes because they were used to indicate that article when plaintiff was its only maker, or, at any rate, the only maker known to him. In other words, he erroneously inferred that, because they were used to describe the article when there was **no other maker but** plaintiff, therefore they distinguished between makers. He was asked how he knew that people want plaintiff's manufacture of the article when they ask for "coke" and "dope," and he replied:

" 'Dope' and 'coke' had been common nick-names since I had been knowing it,—nick-names for 'Co-

ca-Cola' before I ever heard of any substitute or any other preparation with a similar name,—ever since 'Coca-Cola' was put on the market,—and I took it for granted that was what they wanted." (Rec., 575).

And again:

"You ask if I have ever heard of any other cola beverages on the market today; well, I can't recollect the names, but I have heard, in a way, there was a lot of other preparations under different names,—the same stuff, practically, that the Koke Company made. *No, certainly I don't know what they are, and I don't know what names they are called for by.* *** Yes, sir, our customers know we are handling just 'Coca-Cola,' and, naturally, when they go there they expect to get 'Coca-Cola,'—that is, *some* of them do; but they ask for 'dope' and they expect to get 'Coca-Cola,'—*lots* of them think it is 'Coca-Cola,' *ninety-nine per cent.* of them,—because they know we are handling 'Coca-Cola.'" (Rec., 575-6).

G. H. UPCHURCH, Mobile, Alabama:

"No, sir, I have never handled any other beverages similar to 'Coca-Cola.' *** No, sir, I don't know what names the public use in calling for these beverages, because I never had any calls for them. I don't know whether the public calls for these beverages under the names of 'coke' or 'dope,' but I know my trade; you can ask them invariably what they want, and they say 'Coca-Cola.' Q.—Sure, but you don't handle anything but 'Coca-

Cola?' A.—No, I don't handle anything but 'Coca-Cola.' ” (Rec., 525-6).

DAVE S. BAUER, Mobile, Alabama:

“No, sir, you didn't understand me to say that I carried no other soft drink but 'Coca-Cola. I said no other *cola* drinks. (Rec., 538) No, sir, I don't know the names by which the public asks for these drinks, or for drinks of that class. *I don't know whether they ask for these drinks by the names of 'coke' or 'dope' or not. No, sir, I don't know whether 'coke' and 'dope' are also nicknames for those drinks.*” (Rec., 543).

This witness tells of an incident showing that his customers didn't know of any drink of the kind in question but that made by plaintiff. When solicited by one of defendants' salesmen to stock up with defendants' product, he declined to do it, but decided to make a test to find out what his customers wanted when they asked for “coke” and “dope,” etc. He instructed his dispensers to tell every one who asked for “coke” or “dope” that he carried nothing but “Coca-Cola,” and to show them the card left by defendants' salesman (*Plaintiff's Exhibit 100*) having thereon the words “Koke” and “Dope” as displayed on defendants' packages. He explained the result as follows:

“Of course, I watched this pretty close to see what effect it would have on my business, and I visited my soda fountain more often than usual, and whenever I seen that card shown them, *without one exception* I heard the reply, ‘Say, I want

"Coca-Cola." *I didn't know there was two drinks, I didn't know there was another one like that.'*" (Rec., 537).

FREDERICK CONWAY PEACE, one of plaintiff's private detectives, tells of a conversation he had with C. G. Peters (who was called as a witness for plaintiff) that furnishes another typical illustration of the line of reasoning by which these "trade" witnesses inferred that "coke" and "dope," etc., had acquired a secondary meaning:

"Among other places, I called on Peters Pharmacy, the corner of Baronne and Poydras Sts., New Orleans, and interviewed Mr. C. G. Peters, the proprietor of this store. I told him who I was and inquired of him what his opinion was when people called for 'coke' or 'dope,'—what they meant. Mr. Peters said they meant 'Coca-Cola;' that he had been handling 'Coca-Cola' for eighteen or twenty years, and that 'dope' and 'coke' had been nicknames for 'Coca-Cola' *long before any imitation product ever came on the market.*" (Rec., 701).

Evidently, they distinguished between different makes of the same article long before there was any makes but plaintiff's.

JACOB SCHRODT, Dallas, Texas:

"I know that drinks are served that are similar to 'Coca-Cola' at other fountains,—I have drunk some of them,—but I have had no experience of my own knowledge to know what the run of customers call them. We don't buy anything that looks

like 'Coca-Cola' but 'Coca-Cola.' (Rec., 744). *** I handle no other similar drink,—nothing similar to 'Coca-Cola,'—and never have. My custom is built up as a 'Coca-Cola' custom in that particular line, and, of course, I try to keep it, and they so understand that I am catering to the 'Coca-Cola' taste and custom. *** At least five or six or seven years ago people called it 'dope' because some of them thought 'Coca-Cola' contained stuff that would make them 'dopey,' and even to this day some of them think so." (Rec., 742).

This witness instructed his employes to always ask, when customers called for "coke," or "dope," or "shot-in-the-arm," or any of those expressions, what they meant, and he explains why:

"My endeavor is to find out whether they really mean that or something else,—a man might say 'Give me a "dope,"' and he might mean 'Dr. Pepper' [a similar drink], which I consider is a pretty good *dope*, *** and I want to make *sure* that I *know* what they want; that's my idea in training my help." (Rec., 742).

FRED SCHWARTSENBURG, New Orleans, La.:

"No, sir, we don't sell any other cola drinks; nothing but 'Coca-Cola.' We have never had anything to do with other drinks of that same kind. When they do use 'coke' they mean 'Coca-Cola.' Oh, yes, they use the names 'coke' and 'dope' and *anything they think will recognize they mean 'Coca-Cola.'*" (Rec., 681).

How could the dispenser “recognize they mean ‘Coca-Cola,’ ” except from the description given by the primary descriptive meaning of the words used?

R. W. ELLIOTT, soda dispenser, Mobile, Alabama:

“Of course we don’t handle any other cola drinks. Yes, sir, I am entirely a ‘Coca-Cola’ man, and so is my establishment. (Rec., 565). *** Of course I don’t know what other people call their particular ‘dope,’—or their particular drink, rather. *I don’t know whether they call their drinks ‘dope’ and ‘coke’ or not, nor do I know whether or not ‘dope’ and ‘coke’ are common names for sola beverages as a class.*” (Rec., 566).

GEORGE S. MORSE, New Orleans, La.:

“No, sir, I have handled none of the other sort of drinks. *** Of course I don’t know what the other soft drinks are, or what names the habitues call for them under.” (Rec., 647).

J. W. ARRANT, Dallas, Texas:

“Yes, sir, we have the reputation of being the largest dispensers of ‘Coca-Cola’ in Dallas, and we handle large quantities of it. We make that a specialty, and, since we cater to it, we want that custom, and we certainly do keep it. *** Our customers, of course, are ‘Coca-Cola’ customers. They come there because they know they can get ‘Coca-Cola’ there. We have them come from all over Dallas,—from Sanger’s, and all over town. *** We also carry signs advertising that we carry *real*

‘Coca-Cola,’—to ask for ‘Coca-Cola’ by *its* name. Everybody in Dallas knows they can’t get anything else but ‘Coca-Cola’ from me. No soft drinks similar to that are carried.” (Rec., 749, 750).

S. Y. ALLHOFF, Dallas, Texas:

“We are not selling any drink of the same nature as ‘Coca-Cola’ at the Owl Drug Co. *** Yes, sir, our customers are ‘Coca-Cola’ customers. They come to us because they know we sell it. It is our boast, our brag, that we dispense pure ‘Coca-Cola,’ and nothing but pure ‘Coca-Cola.’ ” (Rec., 763).

DR. G. D. WISE, Atlanta, Georgia:

“No, I have never handled any drink similar to ‘Coca-Cola’ since I have been in business,—no other so-called cola beverage or caffeine containing beverage.” (Rec., 476).

J. F. REDDING, Atlanta, Georgia:

“No, sir, I have never handled any beverage similar to ‘Coca-Cola’ other than ‘Coca-Cola.’ *** Why, no, sir, I don’t know that I do know of any similar beverage to ‘Coca-Cola’ that is being sold in Atlanta. I know they have tried to sell them, but I couldn’t say they are on the market because I don’t handle them. Probably they are, but I don’t know that.” (Rec., 479, 480).

L. STEPHENS, Atlanta, Georgia:

“No, sir, I have never handled anything else but but ‘Coca-Cola’ at my fountain. *** I have seen

several drinks on the market similar to 'Coca-Cola,'—'Ko-Nut,' 'Afri-Cola,' 'Cola-Ade.' *** No, sir, I don't believe I have ever seen the soda fountain beverage 'Ko-Nut.' *** All I seen was in bottles. *** Yes, sir, I have seen 'Afri-Cola;' it was a bottled beverage. I don't know whether they dispense that at soda fountains or not, because I never did handle anything but 'Coca-Cola' at soda fountains where I worked. No, sir, I have never have seen anq such beverages besides those two." (Rec., 486).

J. B. PENDERGRAST, Atlanta, Georgia:

"Well, we have tested a number of beverages similar to 'Coca-Cola;' we have had samples brought to us and tasted them, things of that kind,—never served any of them, though. Yes, sir, we have been an exclusive customer of the Coca-Cola Company during the time we have been in business. Some of the nick-names I have heard 'Coca-Cola' called by are '*Candler's* dope,' '*Candler's* cocktail,' 'shot,' 'morning's morning,' 'eye-opener,' " etc. *** "In all these instances we served 'Coca-Cola.' No, sir, we have no other similar beverage in our fountain but 'Coca-Cola.' No, sir, we haven't any other so-called cola or caffeine-containing beverage in our fountain." (Rec., 497).

If "dope" distinguishes *Candler's*,—that is, the Coca-Cola Company's,—make from all other makes, why should those who want that make think it necessary to ask for *Candler's* dope"?

The testimony of the witnesses in this class proves far

too much. If it establishes a secondary meaning for "coke" and "dope," it also establishes a secondary meaning for "drug," "needle," "eye-opener," "morning's morning," "shot-in-the-arm," and every sort of word or phrase that carries with it the same primary signification,—that is, that indicates the nature of the drink, or its ingredients or effects,—because all these expressions are used in exactly the same way as "coke" and "dope" are used, and for the same purpose, and are said to mean "Coca-Cola" no less specifically than do "coke" and "dope." If plaintiff could maintain such a proposition, it could monopolize any and all words appropriate to **express the *idea*** which these words primarily convey,—that is, all words that aptly *describe* the commodity,—for, when this testimony is all boiled down, it comes to this: If the drink is *described*, no matter what the *words* used, it is *plaintiff's* manufacture that is referred to.

GEORGE C. KERSHAW, Dallas, Texas:

"Some people call for 'Coca-Cola,' some express it as 'coke,' and still some others use a worse and more slangy expression,—they say 'shot-in-the-arm,'—'give me a shot-in-the-arm,'—all meaning 'Coca-Cola,' or so taken by me and the soda fountains." (Rec., 812).

PIERRE AUGUST CAPDAU, New Orleans:

"Some will say, 'give me a "coke,"' and some will say, 'give me a "dope,"' and still others will say, 'give me some drug,'—they all use a humer-

ous expression, or a slang expression, and it always indicates the one thing, and that is 'Coca-Cola.'” (Rec., 665).

W. A. MEDLOCK, Atlanta, Ga.:

“When a man asks for a ‘morning’s morning’ or a ‘dope,’ I understand that to mean “Coca-Cola.” I do not furnish anything else in response to such requests because I don’t handle anything like “Coca-Cola.” (Rec., 483).

A. T. TIMMS, Dallas, Texas:

“They ask for ‘coke,’ ‘needle,’ and all like that,— I don’t pay much attention to it. When a person uses these expressions, I ask him and he says ‘Coca-Cola’ every time.” Rec., 753).

R. M. ELLIOTT, Mobile, Alabama:

“Yes, sir, these customers of ours call for this drink in the language of a dope fiend. *** Q.— And you know this is the language of a dope fiend, and, consequently, supply ‘Coca-Cola’ when they call for ‘dope’? A.—Well, working around a place like that, we are *suppose to know* what he wants, —if he nick-names, calls it *anything else*, we are *supposed to know he wants ‘Coca-Cola.’*” (Rec., 564).

G. A. HARBOUR, Atlanta, Georgia:

“Yes, sir, I recognize ‘dope’ as a nick-name for for ‘Coca-Cola.’ Well, yes, sir, they use other nick-names as well; they call it by *everything under the*

sun, almost. Some of them call it 'shot,' and some of them call it 'coke,' and 'dope,' and 'Candler's High-Ball,' and *everything else.* I believe if they were to come in and *ask for a thing we didn't know what they were talking about, we would serve them 'Coca-Cola.'* " (Rec., 457).

D. R. KEYSER, Dallas, Texas:

"I haven't any idea why they call it 'dope,' or a 'shot-in-the-arm,' unless it's on *account of the stimulating effect*,—that is the only reason I have why they should call it that." (Rec., 810).

Passing now to those of plaintiff's "trade" witnesses of the second class,—those who really know something of the other drinks and the names used by the public in asking for them,—the following extracts will serve to illustrate the trend of their testimony:

J. T. HAIZLIP, Ft. Worth, Texas:

"I have never tried to dispense any of the other beverages, but I have drunk it at the soda fountains. Yes, I know the different names by which the public,—the consuming public,—ask for these other beverages. They usually call for 'coke,' I think. Yes, they call for *all of them* as 'coke,' and put them all in the same class with 'Coca-Cola.' (Rec., 1962) *** You ask why I suppose people would apply the name 'dope' to *one* 'dope' and not apply it to all the *other* 'dopes'; well, I have an idea they apply it to all the other dopes. Yes, sir, *they put them all in the same class, if they know there is another dope.*" I know people who would come in

and say,—if they asked somebody to take a drink, —‘Do you drink ‘Coca-Cola,’ or do you drink ‘Koke’? Oh, well, it’s all ‘dope’ anyway,—what’s the difference?’ ‘So go ahead, I’ll drink with you.’” (Rec., 1964).

J. M. PENLAND, Waco, Texas:

“Yes, I am acquainted with the fact that there are various drinks on the market similar to ‘Coca-Cola,’ I know that there is. Yes, sir, I class those drinks as ‘dopes,’ most of them. *** I don’t know that I would class *all* of them, because I don’t know about them, but *the ones I do know about I would class as ‘dope,’ yes, sir.*” Rec., 1980).

GE. L. SEIBERT, Mobile, Alabama:

“It [‘dope’] means a drug on the order of cocaine, that is the only way I have heard of it, and a drink *something on the order of ‘Coca-Cola.’* *** You ask if there is any other drink I know of called ‘dope’; well, only *on the order of ‘Coca-Cola.’* Yes, sir, *any drink on the order of ‘Coca-Cola’ is called ‘coke’ and ‘dope.’*” (Rec., 553).

S. B. CHRISTY, one of plaintiff’s bottlers at Murfreesboro, Tenn., formerly bottled a ‘dope’ drink not of plaintiff’s manufacture; referring to that drink, said:

“Yes, sir, they called our drink ‘coke’ in 1902. All of us at the factory called it ‘coke,’ and the men that worked at the factory, and the people in general,—our customers. The fact of the business is *they call all of these drinks ‘coke,’ at times. These*

cola drinks are generally known as 'cokes' and dopes.' ” (Rec., 2034).

CLAUD W. HICKEL, a drug clerk at Charlestown, W. Va., who formerly dispensed a number of “dope” drinks in Florida:

“The majority of the customers at the Anti-Monopoly Drug Store could tell the difference between the drinks we were selling and ‘Coca-Cola.’ The reason why I know that a majority of them could tell the difference between the drinks we sold and ‘Coca-Cola’ is because they would tell me so. *** The majority of our customers,—what I mean, regular customers,—didn’t ask for ‘Coca-Cola.’ *They asked sometimes for ‘dope,’ and sometimes for ‘coke,’ but they knew they were not getting ‘Coca-Cola.’ ” (Rec., 266-7).*

And again, referring to the drinks similar to “Coca-Cola” which he dispensed:

“We called them ‘dope,’ ‘coke,’—whatever the customer asked for. Q.—What names did you use to classify these drinks? A.—We generally called them ‘dope.’ ” (Rec., 2065).

JOHN H. BOHNE, a “Coca-Cola” jobber of St. Louis, who formerly manufactured the “dope” drink known as “Orin-Cola”:

“We created a demand for our drink under the name of ‘Orin-Cola.’ I place that beverage in the class which I designate as cola drinks. *It was known as ‘dope,’ also.*” (Rec., 2046).

The only indication, in plaintiff's entire record, of the meaning of "coke," or "dope," coming first handed from any one not connected in some way with plaintiff, and not connected in any way with the trade, and who may, therefore, be classed as an "ultimate consumer," appears on page 19 of the transcript in the case of *State vs. Rice*, filed as *Plaintiff's Rebuttal Exhibit 3*. Mr. Benjamin Allen, the attorney for the defendant in that case, was cross-examining the prosecutor, J. C. Mayfield, when the following illuminating passage occurred:

"(Q) Don't you know it is a formula that is alleged to be similar to the 'Coca-Cola' formula? (A) It is a soda fountain drink. (Q) So is butter milk. Don't you know it is similar to other formulas alleged to be in existence? (A) May be similar. (Q) These drinks are what is by the common people known as '*dope*' drinks? (A) I think some people call them that."

That plaintiff's officers themselves realize that these slang expressions have not lost their natural and ordinary signification, and that they have not acquired the secondary meaning contended for, is suggested by the following:

SAMUEL C. DOBBS, plaintiff's vice-president and sales-manager:

"I have even heard a boy going to a soda fountain say, 'give me a "*shot-in-the-arm*,"' and *I corrected* the boy,—over on Alabama and Broad Street, he called for '*a shot-in-the-arm*,' and the man served him 'Coca-Cola.' " (Rec., 321).

If "*shot-in-the-arm*" means *plaintiff's manufacture* and *nothing else*,—if its *primary* sinister signification has been *supplanted* by the *secondary* meaning contended for,—why should Mr. Dobbs have *corrected* any one for asking for plaintiff's product by a name which signifies nothing but *plaintiff's manufacture*?

GEORGE MOORE, a dealer in "Coca-Cola" exclusively, Atlanta:

"Sometimes they ask for 'coke' or 'caffeine' and 'Candler's High-Ball,'—they mean 'Coca-Cola' just the same, that's what they want,—just a nick-name they have for it,—and even myself,—I am *ashamed* to say it,—myself the boss, when I want sometimes a drink, I say, 'give me a *dope*.' I just got the habit of it. *I hate to say it*, but I do it many times, a good many times." (Rec., 487-8).

If "*dope*" signifies in the mind of this witness *plaintiff's manufacture* of the article described thereby, why should he feel *ashamed* of signifying that fact and *hate* to admit that he does so?

F. L. SKILLEN, plaintiff's retail dealer, of Dallas, Texas, was being questioned on re-direct examination by General Crane, of Dallas, Texas, of counsel for plaintiff, with reference to a physical examination he had undergone, as an habitual drinker of "Coca-Cola," to furnish evidence for the use of the Coca-Cola Company in a libel suit which it brought against Congressman Jeff McLemore, of Houston, Texas, for publishing a statement regarding the ingredients and effects of plain-

tiff's product. The following question, asked by Gen. Crane, is very instructive:

"You ask if I don't know that it was during the time that the case of the *Coca-Cola Co. v. Jeff Mc-Lemore* was pending in the Federal Court at Houston, in which he was *charged with libel* for publishing that 'Coca-Cola' was a *dope* deleterious to health." (Rec., 800).

These passages, and the admissions of plaintiff's "trade" witnesses, strongly confirm defendants' insistence and singularly fail to corroborate plaintiff's contention. In view of the admissions of plaintiff's own witnesses, still to contend that the words involved in this case have any designative significance, or are anything more than common words of description, is idle. It is difficult to be patient with the oft repeated assertion of counsel that these words are, to any extent whatever, understood to refer to plaintiff's product as an identifying designation, or have a secondary meaning.

But the testimony of plaintiff's six traveling salesmen and its five detectives has not yet been considered. Wholly apart from the manifest bias of these witnesses, and the repeated demonstrations from their own lips, in the case of the detectives that they do not value the sanctity of an oath, their testimony is worthless in view of the revelations made by plaintiff's "trade" witnesses.

The salesmen are certainly not in as good a position to know, at first hand, the facts upon which they base their inference, as are the dealers who are thrown more

directly in contact with the general public. One of them, M. Tomlinson, frankly admits that he does not know any drink like plaintiff's but that of its manufacture. (Rec., 368).

Oscar Cliff Hightower (Rec., 366) and Maynus L. Ramey (Rec., 369) mention no other drink except that of plaintiff's manufacture, and there is nothing to show whether or not they know the drink as made by any one else. George J. Martin says that, apart from his experience as a "Coca-Cola" salesman, his opinion as to the meaning of the words in question is based upon his experience as a dispenser for Holt & Kates, at Newman, Ga., where "Coca-Cola" was dispensed in response to requests for "coke" and "dope," because, as he says, Holt & Kates had *nothing else* in the house in the way of a syrup, *except "Coca-Cola" syrup*. (Rec., 340). W. L. Sams, when asked to name the various drinks he had seen dispensed, mentioned no dope drink except "Coca-Cola." (Rec., 337). Winton H. Troutman knows the drink "*Chero-Cola*" (which is put out only in bottles) and has observed people asking for and purchasing it. When asked if he had ever heard "Chero-Cola" asked for as "coke" or "dope," he replied:

"It might be in *one or two instances* I have heard it, I didn't pay any special attention." (Rec., 371).

The testimony of the five detectives, Thomas Leslie Boswell, David Emory Bolton, Thomas M. Murphy, Frederick Conway Peace, and Samuel Friend, consists,

for the most part, of lengthy, monotonous recitations of unsworn, *ex parte*, hear-say statements they procured retails dealers to make to them with reference to what those dealers understood their customers to understand the words "coke," "dope," etc., to signify when used in asking for soft drinks. The proper weight to be attached to this sort of alleged evidence will more clearly appear when it is observed that the dealers whose opinions and gossip are thus retailed at second, and sometimes even at third, hand were, with few exceptions, persons who dealt in plaintiff's product exclusively and who had never handled any other. Even if the opinions of these dealers, which come to us through such tortuous and questionable channels, were accepted at their face value, there is nothing to show that their opinions rest upon any firmer basis than those of plaintiff's "trade" witnesses who took the stand and spoke for themselves. Indeed, a large portion of the testimony of these detectives consists of second-hand versions of the inferences reached by plaintiff's "trade" witnesses who have testified for themselves, and of the facts from which those inferences were drawn. These tedious recitations were read into the record by the detectives from written reports made to their chiefs while engaged in making their "investigations," and were read because these individuals had no independent recollection of the contents of those reports. (e. g., Rec., 712).

But the monotony of these recitations is varied by a stereotyped recounting of "observations" personally made by these detectives, which they refer to as "spigot

tests." They say they visited numerous soda fountains throughout the South and called for "Coca-Cola," "coke" and "dope," on separate occasions, and observed others calling for drinks by those names, and that in each and every instance, with few exceptions, the syrup used to make the drinks served in response to all these calls was invariably drawn from the same spigot, or container, in the fountain. But that is not astonishing in view of the fact that practically all of the places visited carried nothing of the kind but "Coca-Cola." Why should such stores have kept their "Coca-Cola" in two or more containers and served it from one container when "coke" or "dope" was called for, and from another when "Coca-Cola" was called for? The most that these "spigot tests" establish is that "Coca-Cola" is habitually dispensed when "coke" and "dope" are called for in those establishments that do not carry any other similar drink; or else that those who serve other brands of the article when "Coca-Cola" is called for regard the words "coca cola" as simply the *formal* descriptive name of that character of drink, having no secondary reference to any particular maker, and, consequently, supply any brand of the article when it is asked for by its descriptive name.

The details are also given of a number of what are pretentiously called "consumer's tests." These were made in this way: The detectives would "instruct" the dispenser on duty at the fountain where the test was to be made to ask each person who called for "coke" or "dope," during the time the test lasted, if he wanted "Coca-Cola,"—usually by merely asking "Coca-Cola?"

(Rec., 729) but sometimes by asking what the customer wanted. The detective would station himself in the vicinity of the fountain where he could hear the questions of the dispensers and the replies of the customers. These tests were all, without exception, made at places that carried nothing but "Coca-Cola" and that that never dealt in anything else of that kind, and that were well known in their communities to be handling nothing but "Coca-Cola." Their customers were people who, no doubt, wanted "Coca-Cola" and who, therefore, came to these well known "Coca-Cola" dispensaries to get it. The results of these tests would seem to be that, in each and every instance, every person who was asked if he wanted "Coca-Cola" replied in the affirmative and every one who was asked what he wanted said, "Coca-Cola." These tests might have had more force as evidence if the people of whom the questions were asked had been shown to be acquainted with the drink as made by any one else, or if any circumstances had been shown to indicate that when they said they wanted "Coca-Cola" they intended to indicate specifically the drink when manufactured by plaintiff as distinguished from the same drink when made by others,—and not merely to indicate the *character* of drink which those words describe. The only circumstance appearing in connection with these so-called "consumers' tests" that serves to suggest a knowledge on the part of any of the "Coca-Cola" customers who were questioned, of any dope drink except that made by plaintiff, also serves to impeach the reliability of the testimony by which the results of these "consumer's tests" are revealed.

DETECTIVE FREDERICK CONWAY PEACE:

“In the consumers’ test made at the Oriental Drug Co., Dallas, Texas, I remained at this store from 10 A. M. to 5 P. M., during which time 47 persons called for ‘coke’ and nine persons called for ‘Coca-Cola.’ Mr. Ernest Brown and R. S. Evans were dispensers. I heard the customers call at the soda fountain for these drinks, and heard the questions which the dispensers put to them, and heard the responses of the customers to the dispensers’ questions. *In each and every instance*, the customers replied that they wanted ‘Coca-Cola.’” (Rec., 705).

O. M. BROWN, dispenser at Oriental Drug Co., Dallas:

“About three weeks ago, at the request of the ‘Coca-Cola’ representative, *Mr. Peace*, I put on a test at the Oriental Drug Store, of our customers coming in. Q.—Well, now, what proportion of these people that called for ‘coke’ during the time that test continued wanted ‘Coca-Cola,’—that called for ‘coke’? A.—*Well, half of them, anyway.*” (Rec., 764).

There remains to be considered the evidence produced by T. C. Lupton, plaintiff’s bottler at Dallas. He introduced as exhibits a large number of written orders, addressed to his bottling plant by the customers thereof, for “coke,” the orders reading substantially like this: So many cases of *strawberry*, so many cases of *root beer*, so many cases of *lemon soda*, and so many cases of

“coke.” The orders thus given for “coke” were supplied with the “coke” of plaintiff’s manufacture, and it proved to be the article that had been ordered. Plaintiff must have wholly misconceived the force of this testimony. It no more proves that “coke” means plaintiff’s manufacture than it does that strawberry or lemon soda, or root beer, means plaintiff’s manufacture. Of course, it was naturally inferred that the “coke” bottled by Lupton’s concern was the brand of “coke” desired, inasmuch as the orders were addressed to his concern, just as it was inferred that the strawberry and other flavors which it bottled were the ones wanted. The word “coke” in these orders is merely used descriptively to distinguish the “coke” drink from the other kinds of soda water bottled by Lupton.

This is all the evidence plaintiff has adduce in its effort to establish a secondary meaning for “coke” and “dope.”

On the other hand, defendants have brought forward seventy-one witnesses, all of whom say that they understand the words to refer simply to the kind of drink to which, for want of a better one, the name “cola” has come to be applied by the trade as its dignified appellation, and that in response to requests for “coke,” “dope,” “shot,” etc., they serve whatever brand of the drink they happen to have in stock without regard to its manufacture. Usually, if they carry both “Coca-Cola” and another brand, they serve the other brand, whatever it may be, because it costs them less than plaintiff’s brand

and they make a larger margin of profit on it. This applies to both the soda fountain and the bottled products. In this connection it is shown that there are literally hundreds of drinks of this description now on the market. A few of the many brands disclosed by this record are: "Afri-Cola," "Ala-Cola," "Ameri-Cola," "Arrow-Cola," "Brainol," "Celery-Cola," "Chero-Cola," "Coca-Cola," "Coca-Nola," "Co?Co," "Cola-Nip," "Cola-Queen," "Dope," "Dixie," "Espo-Cola," "Fletcher's Cola," "Ga.-Cola," "Gay-Ola," Gerst's Cola," "Gibb's Cola," "Glee-Nol," "Glee-Ola," "Hay-O-Cola," "It's-A-Cola," "J. D. F. Cola," "Koke," "Ko-Nut," "Kola-Rex," "Lemon-Cola," "Lime-Cola," "Luck-Ola," "Mar-Cola," "Mays-Ola," "Maud-Muller," "Mint-Cola," "Miss-Ola," "Mo-Cola," "Murphy's Cola," "My-Coca," "Matthews' Cola," "Misti-Cola," "Nifty-Cola," "Niger-Cola," "Nerve-Ola," "Nova-Cola," "Orin-Cola," "Pepsi-Cola," "Pepsin-Ola," "Queen-Ola," "Roxie-Cola," "Rye-Ola," "Sheer-A-Cola," "Star-Cola," "Tenn-Cola," "Texa-Cola," "Tru-Cola," "Uncle Sam," "Wise-Ola," "Zero-Cola," and hundreds of others. Many of these brands have been marketed, in a comparatively small way, for years.

A very cogent kind of proof offered by defendants is that with reference to the bottled drinks. An instance of this kind that is particularly striking is that in connection with the sale of "Star-Cola" at the base-ball park in Nashville. Diehl & Lord have the exclusive concession to sell refreshments at this park, and have advertised the fact profusely,—on bill-boards, in the news-

papers, at "movies," on theatre programs, and on fans and novelties of various kinds, as well as on the score cards at the park. A large display sign-board, inside the grounds and staring the grandstand in the face, carries the information that "Diehl & Lord's Star-Cola exclusively sold on these grounds." The boys who dispense the drink call out, "Diehl & Lord's Star Cola," and they wear caps bearing conspicuously the name "Star-Cola." The bottles are carried in small cases on which the name "Star-Cola" conspicuously appears. The bottles themselves have the words "Star-Cola" blown in the glass, and on the crown, while a white paper label, with the words "Star-Cola" and a star printed thereon in dark red, is glued to the bottle. No one could mistake the origin of the drink. And yet "Star-Cola" is habitually asked for, as many of the witnesses testified, as "coke," "dope," "cola," "shot-in-the-arm," etc., etc. (Rec., 1083).

There are many other striking incidents in defendants' testimony, which will be found in the schedules.

Some of defendants' witnesses are bar-tenders, grocers and proprietors of restaurants. They were called because they are the class of persons most familiar with the trade in bottled goods. It will be recalled that plaintiff did not call a single bar-tender, although its drink is sold in many saloons. Many of defendants' witnesses are druggists and soda dispensers, a large number of whom handle one or more of the other brands of "dope," or "cola," drinks. These were called because they are the class of persons who, of all others, ought to know whether or not the words "coke" and "dope" are applied

exclusively to plaintiff's manufacture at soda fountains. To guard against the accusation that these witnesses were biased in favor of the cheaper products because they made a larger profit on them than on "Coca-Cola," a number of dispensers and head-dispensers at such establishments as the United Cigar Stores, "Skalowski's" at Nashville, "Nunnally's" at Birmingham, etc., which dispense "Coca-Cola" exclusively, were called; and they were quite as explicit as any of the other witnesses in saying that "coke" and "dope" do not specifically identify the article of plaintiff's manufacture. Three manufacturers of other "dope" drinks, viz., of "Star-Cola," (Rec., 1082) of "Ko-Nut" and "Afri-Cola," (Rec., 1291) and of "J. D. F. Cola," (Rec., 1091) were introduced. These gentlemen, for fear of antagonizing plaintiff and bringing down its wrath upon their heads, refused to appear until they were encouraged to take the stand by the marshal. Four bottlers of various "colas," among others "Tru-Cola," (Rec., 978) gave their evidence, while three wholly disinterested members of the general public,—“ultimate purchasers,”—gave the only first hand information in this entire record as to what those of the general public who know there are other drinks in the market similar to plaintiff's actually mean when they ask for "coke," "dope," etc. (Rec., 1075; 1358; 1404).

On cross-examination, several of defendants' witnesses admitted that, before they had heard of the drinks as made by anybody else, they dispensed plaintiff's make exclusively, and that, at that time, not knowing that

there were any other makes, they understood "coke" and "dope," etc., to refer exclusively to plaintiff's.

Even if plaintiff had made out a prima facie case, the evidence of defendants' witnesses is quite sufficient to overcome it. In view of the admissions of plaintiff's own witnesses, there is no room for further dispute. As well might a cigarette manufacturer have sought to establish that a request for "a pack of coffin tacks," or "nails," or "dope," meant his particular manufacture; or a cigar manufacturer, that "nicotine," "cabbage leaves," "weed," or "a rope," referred exclusively to the cigars made by him; or a packing-house, that a request for "a dog" meant its particular brand of sausage.

In *Coca-Cola Co. v. Branham*, 216 Fed., 264, it was said:

"Plaintiff also urges that 'Koke' has become the 'secondary name' of its product, because it appears from the proof that some persons desiring that product say to the dealer, 'Give me a Koke.' A trade-name may be acquired by adoption or user. In their brief, counsel for plaintiff quote the following from 38 *CYC.*, 765: 'Trade-names are acquired by adoption and user and belong to the one who first used them and gave them a value.' But plaintiff has never used the word 'Koke' in connection with its product. It has taken and used the name Coca-Cola. *** Assuming that there is such a thing as a secondary trade-name, the right to its exclusive use must depend upon adoption and use, just as in the case of a primary name. There is such a thing as a name having acquired a secondary meaning.

Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S., 665, 21 Sup. Ct., 270, 45 L. Ed., 365; *Bates Mfg. Co. v. Bates Numbering Machine Co.* (C. C.) 172 Fed., 892. But the facts in this case do not call for an application of that rule. The relief sought here is the prohibition of the use of a name that the defendants [plaintiff] have neither adopted nor used. There is nothing to show that the defendants were using the name for the purpose of selling the beverage manufactured by them for Coca-Cola."

It is urged that this case was overruled, in principle, by *Denver Chemical Co. v. Lilley*, 216 Fed., 869 ("C. C. A."-8) in which a secondary meaning for "Denver Mud," as applied to plastic dressings, was held *not* to have been established.

In all these cases there are really no disputed propositions of law. There is never any question of plaintiff's right to relief if it can make out its case on the facts. But the difficulty always is in establishing the requisite facts. The deduction to be drawn from the "*Denver Mud*" case is that, while the difficulty of establishing a secondary meaning for a purely descriptive term is always and necessarily great, the fact that plaintiff has not used the word, and has done nothing whatever to cause it to be associated particularly, or at all, with its manufacture of the article, increases the difficulty of establishing a secondary meaning to such an extent as to make it a practical impossibility. In the case at bar plaintiff has not only used the words "coke," "dope," etc., and not done anything to cause them to be associated with its manufacture, but it has consistently and persistently

repudiated them on every hand, and urged the public, through its advertising and otherwise, not to describe its product by such obviously sinister expressions, but to call for it by its *formal* descriptive name, "Coca-Cola."

But even if we should indulge the violent assumption that plaintiff had established a secondary meaning for the words in controversy,—that is only a preliminary step to relief,—it must be shown in addition (there being no property right in the nature of a trade-mark in any of these words) that the defendants' use of the identifying words or phrases is a deceptive one.

As Lord Herschell observed in *Reddaway v. Banham*, 13 R. P. C., 228:

"In a case of this description, the mere proof by the plaintiff that the defendant was using a name or device which he had adopted to distinguish his goods, would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances, or in such manner, as to put off his goods as the goods of the plaintiff."

In that case the injunction was so framed as to prohibit the use of the words "Camel Hair Belting," *without clearly distinguishing such belting from the belting of the plaintiff's.*" In respect of distinguishing, Lord Morris said:

"That, to my mind, is obviously done when the respondents put prominently, and in a conspicuous place, on the article, the statement that it was

'Camel Hair Belting' made by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Redaway's make by stating that it was their own."

In *Rubber C. & C. H. T. Co. v. F. W. DeVoe & C. T. Reynolds Co.*, 233 Fed., 150, 159, plaintiff used the word "Rubberset" while defendants used "Set in Rubber." After holding that a secondary meaning had been established for "Rubberset," the court proceeded:

"The remaining question is, therefore, what specific relief the plaintiff is entitled to,—relief which will protect it from injury, prevent deception of the public, and at the same time preserve the rights of the defendant. To preclude the use altogether of the words 'Set in Rubber' because of their resemblance to the word 'Rubberset,' would be to give to the latter the full effect of a trade-mark, while denying its validity as such. This, so far as the federal courts, at least, are concerned, cannot be done. *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S., 554, 559, 28 Sup. Ct., 350, 52 L. Ed., 616; *Standard Paint Co. v. Trinidad Asphalt Co.*, 200 U. S., 461, 31 Sup. Ct., 456, 55 L. Ed., 536; *Yale & Towne Mfg. Co. v. Ford*, 203 Fed., 707, 122 C. C. A., 12 ("C. C. A."-3). Nor was any such relief granted in *Reddaway v. Banham*, *supra*, but the defendant was permitted to use the name 'Camel Hair Belting' under restrictions which would clearly indicate that the defendant's product was not that of the plaintiff. The rule which must govern the federal courts is that stated by Chief Justice White in the *Singer* case, 163 U. S., 200, 16 Sup. Ct., 1002, 41 L. Ed., 118, that the word or words 'must be

accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact.’ ”

Such an injunction in the present case would be superfluous, because the clearest distinctions already exist. Defendants place their name and address conspicuously on their labels. Even the very words sought to be enjoined,—“Koke” and “Dope,”—spelled and written as they are on defendants labels, clearly distinguish defendants’ goods from plaintiff’s. Nobody, seeing a package bearing either the word “Koke” or the word “Dope,” would ever mistake such a package for one of plaintiff’s having the words “Coca-Cola” prominently displayed thereon. Although several of plaintiff’s detectives said that bottles containing “Koke” and “Dope” were served to them in response to requests for “Coca-Cola,” at several places, not one of them was deceived. They all said, without exception, that as soon as they saw the bottle, with the name on it, they knew it was “Koke” and not “Coca-Cola.” When Dave S. Bauer showed his customer’s the card of defendants’ salesman (*Plaintiff’s Exhibit 100*) bearing the words “Koke” and “Dope” as used by defendants’ on their labels, they immediately knew that a drink of a different manufacture was indicated thereby.

“Whenever I seen that card shown them, without one exception, I heard the reply, ‘Say, I want “Coca-Cola.” I didn’t know there was *two* drinks, I didn’t know there was *another one like that.*’ ” (Rec., 537).

Why, these words so clearly distinguish defendants' goods from plaintiff's that plaintiff brought suit against defendants' bottlers, the Branhams (216 Fed., 264) charging them with unfair competition because they *removed* the crowns bearing the word "Koke" from the bottles before serving them to the public, thus preventing the public from readily ascertaining that the drink was not plaintiff's. (*Defendants' Exhibit 272, p. 15*).

It is respectfully insisted, therefore, that the District Court erred in granting the injunction he did against the use by defendants of the word "Koke" and "Dope."

As well said by plaintiff's counsel in their brief for the defendant in the "*Toasted Corn Flakes*" case (235 Fed., 657):

"Even assuming that there is in this case on the part of the defendant an intent and desire to imitate the complainant's product, and to get the benefit of the market it claims to have made for the commodity toasted corn flakes, there can be no relief unless, as is clearly pointed out by Mr. Justice Holmes [in *Saxlehner v. Wagner*, 216 U. S., 375], there is something done by which the good-will of the *maker*, as distinguished from the good-will of the *product*, is sought to be appropriated."

THE "GET-UP" OF THE GOODS AND PACKAGES.

It is urged further, however, that defendants have imitated plaintiff's product, and the "get-up" of its packages, and that they should be enjoined from making this sort of drink, and from marketing it in the customary kind of receptacles.

THE DRINK ITSELF.

Complaint is made that defendants have imitated the color of plaintiff's drink. But the color of the drink, like its taste, is a structural feature of the article, and a physical requirement essential to commercial success. One could no more market a drink of this character, as such, if it were colored blue, or green, or pink, or yellow, or any other color, than he could market, as root beer, a drink colored green, or as strawberry soda, a drink colored blue, or as ginger ale, a drink colored pink, or as chocolate, a drink colored yellow. The color of the drink is a badge by which the article itself is recognized. Deprive defendants of the right to make and sell a drink having that color, and you deprive them of the right to make and sell that drink.

Diamond Match Co. v. Saginaw Match Co., 142 Fed., 727, 729 ("C. C. A."-6):

"For the purposes of this hearing, we must assume that the complainant has no patent on its matches, and, therefore, this is the question, stated in another form: Is the complainant, without a patent, entitled to a monopoly of manufacturing and

selling tipped matches, with heads partly red and partly blue, simply because it made and put them on the market first?

“We think the answer to this question is plain. The head of two colors is in no proper sense the dress of the match; it is a part of the match itself. In use, the tip must be distinguished from the head, for the match should be struck on the tip and not on the head. The claimed improvement lies in thus striking and lighting it. Whoever, therefore, has a right to make a tipped match, has a right to put on it a head of two colors, so as to distinguish the tip on which the match should be struck, from the head itself. The two colors, therefore, serve not only a useful purpose but an essential function, for the very essence of the tipped match is the match itself, which must be marked out by a color of its own. The head and tip thus distinguished, each by its own color, is therefore a common characteristic of tipped matches. The characteristic is not specific, but generic, and properly applies to all tipped matches. ***

“Evidently the court below appreciated that the head of two colors, a feature common to all tipped matches, should not be monopolized by the complainant to distinguish its tipped matches, for it refused to enjoin the making of tipped matches with heads of two colors, and limited the injunction to heads partly red and partly blue. But we think this was going too far. Sometimes a color, taken in connection with other characteristics, may serve to distinguish one’s goods, and thus be protected by the courts, *** but, as a rule, a color cannot be monopolized to distinguish a product. ***

"The primary colors, even adding black and white, are but few. If two of these colors can be appropriated for one brand of tipped matches, it will not take long to appropriate the rest. Thus, by appropriating the colors, the manufacture of tipped matches could be monopolized by a few vigilant concerns, without any patent whatever. Indeed, it is customary for a large company like the defendant to issue many brands of matches, with heads of different colors. It is now making tipped matches. If, by appropriating two colors for each brand, it could monopolize them, it would soon take all the colors not in use by complainant, and thus cover the entire field at once. For these reasons, we think the court below was in error in holding that the complainant had appropriated the colors of red and blue for the head of its tipped matches."

James Bros., Ltd. v. Anglo-American Optical Co.,
(C. A. 29 R. P. C., 361, 369, Fletcher Moulton, L. J.:

"To my mind, the fact that two people use pieces of similar size of the same well known suitable article has nothing whatever to do with get-up. That is the mere basis of the article. Everybody has a right to sell that without any distinction whatever. If a person has sold it for twenty years, and nobody steps into the market and becomes his competitor, yet a person can come into the market and sell a piece of this kind the next day. What he may not do is that he may not put on that article something which will make the public think that it is made by his rival; in other words, he must not impliedly state that it is the plaintiff's goods. That is the whole of the English law upon the point."

Williams v. Bronnelley (C. A.) 26 R. P. C., 765,
Fletcher Moulton, L. J. (773):

“For instance, supposing that a firm had been, say for twenty years, the only firm to sell wooden chairs in which the natural wood was simply varnished, and not painted at all, that would not give them the slightest right to complain of a person putting on the market chairs simply varnished, even though they had been the only persons who had sold them for so long that such chairs might at first be supposed to be their manufacture. The reason is that the newcomer has not in any way imitated the get-up; he has only reproduced the article.”

James Bros., Ltd. v. Anglo-American Optical Co.,
29 R. P. C., 361, (Court of Appeal), Cozen-Hardy, M.
R., [367]:

“He had been accustomed to see goods of this color, and, not having been accustomed to anybody else’s goods of this nature and color, at first blush, before he looked at it, he said, ‘this must be the Plaintiff’s.’ That, in my view, is not sufficient to justify an action of this kind.”

In *Coca-Cola Co. v. Williamsburg Stopper Co., et. al.*,
Vol. 2, No. 6, Trade-Mark Reporter, June, 1912, Judge
Hough, then presiding in the District Court for the
Southern District of New York, said:

“It is in my opinion a mistake for courts to go beyond the broad and very general principles of the law of unfair competition.

“Being also of opinion that, more and more, men of experience are departing from the doctrine that the basis of unfair competition law is the protection of the public, and coming to the firm proposition that what is entitled to protection is complainant’s property rights, the basis question is always this: What is the *thing* which the alleged infringer has the right to make and sell?

“Here the *thing* is to be dissociated from all such extraneous matter (however important) as trade-marks, packings, wrappers, dress, advertising, and the like.

“Every observer has probably noted some things in common use made by many manufactuers, yet resembling each other, especially in color. Thus there are many white soaps, red dentifrices, and green hair washes; and many people know that these colors are not essential. In this prevailing similarity of color there is a certain amount of imitation. I do not think it can be avoided, nor that it should be prevented. If one manufacturer can appropriate a brown summer drink, others in other businesses can do the like,—the primary colors are soon exhausted, and it needs very little of the spirit of prophecy to see the courts regulating shades of colors as between different proprietors, with results besides which some judicial efforts in the way of labels would rank very high.

“As applied in this case, I think that not only are Cola drinks open to the world, but brown Cola drinks are similarly open, or, in other words, that the unpatented article made by complainant is a *thing* (color and all) which anyone can make and

vend in competition with complainant, and ought to be permitted to do so. *** I think the defendants may choose and use the same shade of brown as does the complainant just as freely as any butter manufacturer can make his butter of the same shade of yellow as that affected by the most popular brand he knows of,—butter, I believe, being naturally whitish in color, at most seasons of the year.”

In *Coca-Cola Co. v. Glee-Nol Bottling Co.*, (MSS. Opinion), the District Court said:

“In my opinion the defendant, the Glee-Nol Bottling Co., had the right to make a beverage and color it exactly the same as the Coca-Cola beverage.”

The decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 221 Fed., 61, 62.

The District Court in the case at bar based its decision as to the color of the drink on the case of *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720. In that case the defendant took no proof. (200 Fed., 722). The plaintiff's case was made out on affidavits. From the affidavits it appeared that the color of the drink was “non-functional,” that it was distinctive of plaintiff's product, and that defendant had imitated the color of plaintiff's drink for the fraudulent purpose of representing its drink to be plaintiff's. But the facts thus set up in the affidavits were very far from the facts that actually exist, as will be presently shown, and, evidently, grossly misled the court.

Supposing the color of the drink to be entirely “non-functional,” what must plaintiff make out to entitle it to prevent others from coloring their drinks the same color?

In *Crescent Tool Co. v. Kelborn & Bishop Co.*, 247 Fed., 299, 300, the Circuit Court of Appeals for the Second Circuit answered the question very clearly:

“The cases of so-called ‘non-functional’ unfair competition, starting with the ‘coffee mill case,’ *Enterprise Mfg. Co. v. Landers, Frary & Clark*, 131 Fed., 240, 65 C. C. A., 589, are only instances of the doctrine of ‘secondary’ meaning. All of them presuppose that the appearance of the article, like its distinctive title in true cases of ‘secondary’ meaning has become associated in the public mind with the first comer as manufacturer or source, and, if a second comer imitates the article exactly, that the public will believe his goods have come from the first and will buy, in part, at least, because of that deception. Therefore, it is apparent that it is an absolute condition to any relief whatever that the plaintiff in the case show that the appearance of his wares has in fact come to mean that some particular person,—the plaintiff may not be individually known,—makes them, and that the public cares who does make them, and not merely for their appearance and structure. It will not be enough only to show how pleasing they are, because all the features of beauty and utility which commend them to the public are, by hypothesis, already in the public domain. The defendant has as much right to copy the ‘non-functional’ features of the article as any others, so long as they have not

become associated with the plaintiff as maker or source. The critical question of fact at the outset always is whether the public is moved in any degree to buy the article because of its source, and which are the features by which it distinguishes that source. Unless the plaintiff can answer this question, he can take no step forward; no degree of imitation of details is actionable in its absence. *** The defendant *** may copy the plaintiff's goods lavishly down to the minutest detail; but he may not represent himself as the plaintiff in their sale."

In the case at bar, facts are admitted which show not only that the color of plaintiff's product does not now and never did have any significance indicative of source or origin, but that it could not have acquired such a significance. Many soft drinks having precisely that same color were on the market when plaintiff's predecessors began to make their drink, and had been for fifty years or more. (Rec., 1083; 926). The defendants' predecessors made a drink similar to plaintiff's, having a similar color, in 1888 (Rec., 382, 383), and they and defendants have continuously manufactured and marketed beverages of that character having the same color ever since. (Rec., 1616). Plaintiff's counsel, in their brief before the District Court, admitted that,—

"It is a fact, as this record clearly shows, that in spite of all the efforts of the Coca-Cola Co. to suppress them, there are innumerable imitations of 'Coca-Cola' on the market. Without exception, these imitations taste as much like 'Coca-Cola' as it is possible to make them, and are indistinguishable from 'Coca-Cola' in appearance." (Brief, p. 161).

In *Coca-Cola Co. v. Branham*, 216 Federal, 264, the Court said:

“According to the testimony of plaintiff’s agent, there are 181 beverages having practically the same color as ‘Coca-Cola.’”

And in *Coca-Cola Co. v. Glee-Nol Bottling Co.*, 221 Fed., 61, 62, (“C. C. A.”-5), the Court said:

“There are many other drinks on the market which have practically the same color as each of these two.”

It is plain, therefore, that the color of plaintiff’s drink has no identifying significance, but is old in the art and common to the trade, and that the court in the “*Gay-Ola*” case was misled as to the facts by plaintiff’s affidavits, just as was the court in *Howard Dustless Duster Co. v. Carleton*, 185 Fed., 999. In the latter case the Court said:

“The plaintiff in 1905 was the pioneer in making and marketing an article known as a ‘dustless duster.’ It is made from white cheese cloth under a secret process, which gives the cloth dust retaining characteristics. From its introduction to the public until this suit was brought, the plaintiff has employed the same methods in making and marketing the article, the important parts thereof being hereinbelow set forth. It went out of its way, and to extra expense, to dye the cheese cloth black, for the sole purpose of giving it a distinctive appearance. It puts this black cloth on a distinctive package, inclosing therewith a distinctive circular. It has spent

much money in advertising its distinctive dust cloth, package, and circular, and has sold about 2,000,000 of its dust cloths under this method. Such extensive sale has taught the public that the distinctive color of the cloth, and the distinctive circular and color scheme of the inclosing package, point to the plaintiff as the manufacturer of such dust cloths, which public recognition is an asset of value to the plaintiff. The defendant***has begun to make dusters which are used for the same purposes as those first introduced upon the market by the plaintiff. He makes them of white cheese cloth, and takes the trouble to dye them black. No other competitors of the plaintiff dye their cloth black.*** The back color is in no sense necessary, and its use must, in my opinion, lead to confusion, uncertainty, and loss of trade, which by right belongs to the plaintiff. The first prayer for relief ought to be granted."

This was a hearing on demurrer. The case again came before the court in 187 Fed., 472, where it said:

"This case was heard upon demurrer last March. *** The opinion was filed on March 9th. On March 15th, counsel for both parties appeared before me and stipulated that the opinion of the 9th might be treated as a final disposition of the case, and, acquiescing therein, I ordered a decree to issue granting the relief asked for in the first clause of the bill. Up to the present time no decree has been issued, and now counsel for defendant asks to have the stipulation set aside, because he has since learned that a valid defense exists of which he was ignorant at the time of entering into the stipulation.

“This matter cuts deeper than can be remedied by a resort to technical rules of practice. What I did in March has been used to influence persons who have no interest in the litigation between these parties. What I shall do now must not be affected by the bickerings of the parties hereto, or by an attempt to saddle the blame upon this one or that one. Let the unvarnished tale explain itself.

“The opinion of March 9th, was based upon my conception of the situation between the parties, as evidenced by the facts set up in the complaint, which were admitted to be true by the demurrer. I understood from the bill that the plaintiff was the first party who dyed white cheesecloth black, at the unnecessary trouble and expense to itself, for the sole purpose of giving the duster a distinctive appearance which would point to it as maker, and that no competitors had dyed their cheesecloth black until this defendant invaded the market. With those facts, and especially the latter one, absent from the case, the opinion of March 9th, would not have been promulgated and the bill would have been dismissed on demurrer, without comment.

“It would seem that my position in the matter ought to have been easily understood from the language used in the opinion. I referred therein to the fact that defendant took the trouble to dye his cloth black, and that ‘*no other competitors of the plaintiff,*’ dyed their cloth black. I am now informed that at least one competitor, and that a strong one has for many years made a duster which is dyed black.

“The only issue between the plaintiff and that

competitor, as I understand it, would be as to which party first adopted that practice. It is plain to me, however, that the exact date of beginning is immaterial. If other parties began to dye their white cheesecloth black before the plaintiff had continued that practice a sufficient length of time to have made its black cloth a distinctive sign, pointing directly and exclusively to its factory, the entire structure upon which my final conclusion was erected crumbles and falls to the ground. ***

“As for the plaintiff, the lenient view of the matter is that it did not realize that it fundamentally affected its rights against this defendant to bring into strong relief those competitors who used other colors than black, and to refrain with exceeding care from mentioning those who did use the back.

“It is unfortunate that the opinion of March 9th. was ever written. I have tried to make it clear that it was founded on a misconception of some of the ultimate material facts. The stipulation of counsel is set aside, because it produced a false situation. The order of March 15th., having been based thereon, is revoked, and the case may proceed in the usual way. The revocation of the order of March 15th. is intended to render, and does render, nugatory and unavailing all statements of fact and conclusions of law to be found in the opinion of March 9th., which grew out of the misconception which I have explained above.”

Doubtless if the actual trade situation as it really exists had been known to the court in the “*Gay-Ola*” case in some appropriate way, it would have taken similar

steps to correct the mistake, as to so much of the case as related to the color of the drink, into which plaintiff misled it.

The District Court in the case at bar enjoined defendants from "coloring any product not the plaintiff's in imitation of or like the color of 'Coca-Cola,' without clearly indicating, in connection with the sale thereof, that the same is the product of the defendants and not of the plaintiff's." (Rec., 244.)

The predicate of that decree was a finding that the color of plaintiff's product had acquired a secondary meaning distinguishing the drink as made by plaintiff from the same drink as made by others. Of course, there is no basis in this case for such a finding, and, therefore, no basis for such a decree.

If the decree simply means that defendants must not sell their syrup in the only way they themselves sell it,—in barrels, kegs, and jugs, to *dealers only*,—without clearly indicating, in connection with such sales to *dealers*, that it is their syrup and not plaintiff's, the injunction is wholly superfluous, because defendants were already doing that when the bill was filed. They plainly labelled the containers in which they shipped their syrup with their names and addresses, and it is not pretended that any *dealers* have ever been misled, or ever will be misled, as to the true origin of their product.

But if the decree that the beverage made from defendants' syrup must not be dispensed to the public by retail dealers, unless defendants so mark it as to clear-

ly distinguish it from plaintiff's product, then it is necessary to consider the effect of the decree as a regulation of the sale of the bottled beverage on the one hand, and of the soda fountain beverage on the other. As to the former, the bottles in which the beverage made from defendants' syrup is sold at retail were already clearly distinguished from plaintiff's when the suit was brought, by labels bearing conspicuously defendants' names and addresses, as well as the words "Koke," and "Dope," and by crowns so readily distinguishable from plaintiff's that plaintiff thought it unfair competition to remove them before handing the bottles to consumers. As to the latter, plaintiff itself has done nothing to distinguish the soda fountain beverage made from its syrup from the similar beverage of others. It has simply put into the market a syrup, having no distinguishing features, from which is made a beverage that bears no indication of its origin. If confusion arises between its beverage and other beverages having the same common features, the confusion is not due to any trespass by others upon any rights of plaintiff, but is due solely to plaintiff's failure to indicate in any way that its product is its own.

Payton & Co., Ltd. v. Snelling, Sanford & Co., Ltd.,
(C. A.) 17 R. P. C., 48 Fletcher Moulton, L. J. (56):

"Then what else do they do with regard to these tins? What is the next most distinguishing feature? The colors. What colors do they adopt? Do they adopt any special new colors? No. They choose to adopt three of the best known colors on the market; colors which admittedly are well known and

commonly used, bright red, blue and green; the size and shapes of their tins not being peculiar.

“Now, the plaintiffs, putting upon the market tins of the class I have indicated, with the well known colors I have referred to, in shapes well known, what are they bound to do if they wish to prevent persons selling tins which could be confused with their tins? The plaintiffs would be bound to use some very distinguishing features, and, if they do not choose to use any distinguishing features, they cannot complain merely because their tins may resemble other persons’ tins in the common features I have indicated. I cannot help feeling that, really, the plaintiffs’ object in this action was, if possible, to establish some monopoly or right to the use of enameled tins in those very ordinary but attractive colors, red, blue, green, and that, of course, they are not entitled to do.”

THE COLOR OF THE BARRELS.

The color of plaintiff’s barrels is in no sense distinctive. This is admitted by its own witnesses. Barrels having that color are in universal use in the trade, and have been for years. It is not disputed that defendants and their predecessors have shipped syrups similar to plaintiff’s in barrels painted that color since 1888. Under these circumstances, it is apparent that the injunctoon was wholly misconceived.

J. W. WARREN, president of the Warren Paint & Color Co., Nashville, Tenn. :

“I have sold paint to the *** Southern Koke Co.,

New Orleans, and the Koke Company of Texas. I sold them red barrel paint. 'This paint I sold them has no particular name, only it is a standard red, universally used by all concerns who have use for a paint on barrels and packages of that kind. It is the cheapest paint you can buy because the ingredients that go to make it up are the cheapest,—red oxide of iron, and, of course, oil. That has been a standard paint ever since I can remember,—oh, eighteen years. That paint has been used mostly for painting barrels, cooperage, and things of that kind. I sell it to all classes and trades. *** I should judge 75 per cent. of all paint that is used for barrels is red, because it gives you more universal satisfaction, and is a cheaper paint. 'There is a paint known as 'Coca-Cola Red.' 'Coca-Cola Red' is a very expensive red, used mostly, from my knowledge, in painting signs, bulletin boards,—things like that. We have matched some paint called 'Coca-Cola Red,' sold to the local sign men here in town doing work for the Coca-Cola Co. 'This 'Coca-Cola Red' is a more expensive paint than this other one because it is a very durable red,—a brighter shade and a special shade. 'There is no comparison at all between the red paint I sell the Koke Companies compared with the color of 'Coca-Cola Red.' One is a very bright vermillion, and the other is a mineral paint; one is a manufactured article, and the other a mineral dug out of the ground. *** 'Coca-Cola Red,' as I know it, is a very bright shade of vermillion, and the other is what we call English Venetian red,—a very much darker shade. *** 'The 'Coca-Cola' people use on their barrels the regular standard English Venetian paint. They do not buy from us, but it is the same kind of red,—universal

paint we all use, all manufacturers use,—they look alike, I could not tell the difference. They do not use ‘Coca-Cola Red’ on the barrels to my knowledge.

*** Our representative called on the Central Koke Co., at Chattanooga, [a distributor for the Koke Company of America] and in their conversation told him what kind of paint we had, etc., and he bought five gallons to try. Nothing whatever was said about the shade, he just bought five gallons of our standard red barrel paint and we sent it to him, and since that time have been getting orders. The price was the reason he bought from us, probably. I think it was cheaper than the paint he had bought before.” (Rec., 1166-1169).

HOKE SMITH LEIGH, one of plaintiff’s traveling salesmen:

“You ask if I can distinguish the color of the ‘Coca-Cola’ barrel from all these other barrels. I did not say, necessarily it could be done. *** If there is any doubt, a ‘Coca-Cola’ label settles the doubt. If there is not one on there, I doubt its genuineness. You ask if I could tell just by looking at the barrel without seeing the label; not to get right down to the point of distinguishing one from the other. *** All these substitute barrels look just about alike, all I have seen or noticed, mostly. It is pretty hard to tell one of those from the others.” (Rec., 2235, 2235).

FREDERICK CONWAY PEACE, plaintiff’s private detective:

“Yes, sir, I have seen ‘Koke’ barrels in railroad stations. You ask if I recognized them right off

as 'Koke' barrels; I could not tell whether they were 'Koke' barrels, or whether they were some other kind of syrup barrel. I recognized them as *syrup* barrels. They looked like the *standard syrup barrels used for syrups.*" (Rec., 2215, 2216).

The District Court based its action with respect to the color of the barrels upon the decision in the "*Gay-Ola*" case, 200 Fed., 720, just as in the case of the color of the drink, and, in its opinion, quoted the following extract:

"The red color used by complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly; but this color has long been used by complainant in a way that was *exclusive* in this trade. *No other manufacturer of analogous or competing drinks uses that color of package.*" Rec., 240).

The record in the case at bar shows how grossly the court was misled in that case. There is scarcely one out of the multitude of drinks of this character now on the market that is not shipped in barrels and kegs painted that same color, and at the time the court rendered that decision barrels of that color were in universal use in the trade, and had been for many years, as shown in the accompanying schedules. This is just another instance like that in *Howard Dustless Duster Co. v. Carleton*, 187 Fed., 472.

But even if the color of plaintiff's barrels were distinctive, it is not apparent how the use of that same color

on the syrup barrels of another could mislead the ultimate consumer. The drinks are not served to consumers from barrels, and the consumer has no opportunity to see the barrels at the time of his purchase.

THE SODA WATER BOTTLES.

Both sides have introduced as exhibits an array of bottles used by other manufacturers and bottlers which, in size, color, shape, and general appearance, are indistinguishable from plaintiff's. That plaintiff has not a distinctive bottle is admitted.

H. B. PIERCE, plaintiff's chief detective, in charge of working up the facts in this case:

"Sure, I know a 'Coca-Cola' bottle when I see it. No, it is not a distinctive bottle. No, it is not distinctive. No, 'Coca-Cola' has not a distinctive bottle, not in its present form,—it is distinguished in as much as it has the trade-mark 'Coca-Cola' blown in script on some part of the bottle, and that is the thing that distinguishes it from all the other bottles on the market,—not *all* of the bottles, there are *some* bottles that have a *different size and shape*." (Rec., 2136).

In *Coca-Cola Co. v. Glee-Nol Bottling Co.*, (MSS. Opinion), the District Court said:

"In my opinion the defendant *** had the right to make a beverage, and color it exactly the same color as the 'Coca-Cola' beverage, and to put it *in the same shape bottle*, and also to use a tin cap cover."

In affirming this case, the Circuit Court of Appeals for the Fifth Circuit (221 Fed., 61) said:

“We concur in the conclusion reached by the District Court that the evidence adduced was insufficient to furnish substantial support for the claim of unfair competition made by the bill. *Bottles of the same size, shape, color, and general appearance as those commonly used as containers for the two drinks in question, that of the plaintiff, ‘Coca-Cola,’ and that of the defendant company, Glee-Nol, are in general use as containers of many other drinks which are similarly dealt in.*”

THE DISPENSING BOTTLE.

As to the dispensing bottle, no one says that plaintiff's is to any extent whatever distinctive. On the contrary, it is admitted that it is not.

GEORGE S. WILKINS, the private detective from the office of Edward S. Rogers, Esq., of counsel for plaintiff in this case, in referring to one of defendants' dispensing bottles which he saw on the desk of J. H. Van Winkle, the manager of the Koke Company of Texas, said:

“I saw a bottle standing on Mr. Van Winkle's desk, which was *an ordinary type of dispensing bottle commonly used at soda fountains.* *** On the face of the bottle, blown in on the label, was the word ‘Koke,’—‘K-O-K-E.’” (Rec., 873).

J. A. HODGE, Texas agent of the Illinois Glass Company, Dallas, Texas:

"Defendants' Exhibit 223 is a stock bottle that we carry in stock. It is not a special design made up for any particular concern, it is what we call a machine-made dispensing bottle,—the only form of the kind we have. We have never sold that to the Coca-Cola Co. We sold to the Jersey Cream Co., in Ft. Worth, and Hughes Bros., in Dallas, A. M. Brown, in Dallas, and sold to the various decorators for stock packages. Some of the decorations that have been on there were 'True-Cola,' for Hughes Bros., 'Koke,' for Koke Co., 'Howell's Orange Juice' and 'Grape Juice' for the Jersey Cream Co. That is the cheapest thing we have. We sold some of these bottles to the Koke Co. of Texas. There is a mark on the bottle showing it is an automatic machine made bottle,—the peculiar mark at the end of the glass where it is cut off,—the automatic machine makes that mark on every bottle, and no other kind of bottle has that mark on it. I do not remember what was said, if anything, by the representative of the Koke Co. when he came to purchase that bottle. *** He did not tell me anything about any particular design,—just the cheapest thing we had,—and this, as a matter of fact is the cheapest. We formerly made this bottle up by hand, and it run as high as \$18.00 a gross, and then, when we made it by machine,—machine-made bottle,—it took off 33 1-3 per cent. in price. We had bottles of other shapes, but our trade is confined almost entirely to this since the machine has taken the place of workmen." (Rec., 1756, 1758).

THE CROWNS.

As to the crowns, the following testimony of plaintiff's witnesses ought to dispose of them:

H. B. PIERCE, plaintiff's chief detective:

"Q.—Does the name 'Dope,' as it appears on the caps of the defendants' bottles, look like the name 'Coca-Cola'? A.—Only the script or style of letter used. *** Q.—Do you think you would mistake that for the name 'Coca-Cola' on the crown of the bottle? A.—Not I, I wouldn't. Q.—Do you think anybody would? A.—They may, I don't know. Q.—Do you think any rational being, anybody with common sense, would? A.—I don't know. (*Mr. Hirsch: I object to that; he don't know what a rational being, with common sense would do.*) Q.—Would you mistake the [word] 'Koke,' written [in script on the] caps of defendants' bottles, for the name 'Coca-Cola'? A.—No." (Rec., 2137).

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tenn., speaking of a "Koke" crown:

"Q.—Do you think anybody would mistake that crown for a 'Coca-Cola' crown? A.—Not the reading of the crown. Q.—Well, do you think the general appearance of the crown, anybody would mistake it? A.—The only resemblance between that and the 'Coca-Cola' crown is a little flourish on the letter. Q.—And you think anybody could tell that right off? A.—I think they could." (Rec., 2026-7).

S. B. CHRISTY, a "Coca-Cola" bottler, Murfreesboro, Tenn., speaking of the "Koke" crown he formerly used on the bottles containing the drink which he sold as "Koke":

"A good many of them had crowns like this one.

*** The red letters, on the silver background, with a red ring around them, were in general use at that time [1905]. There was no objection to our using them at that time.” (Rec., 2030).

GEORGE H. WILKINS, the detective above referred to:

“If he hands it across, I would know it is not ‘Coca-Cola.’ *** To the best of my knowledge it would not be ‘Coca-Cola’ with a ‘Koke’ crown.” (Rec., 887).

In *Coca-Cola Co. v. Glee-Nol Bottling Co.*, (MSS. Opinion), Judge Foster said:

“The evidence shows that these caps are made by the million, and are used all over the United States, and anyone can buy them with practically the same style of lettering.”

THE LABELS

As to the labels, the only one of the many kinds defendants have used that is claimed to resemble any of plaintiff's labels is the blue bottle label (*Defendant's Exhibits 59 and 125*) which was used from May, 1913, to October, 1913, when its use was discontinued at the suggestion of J. C. Mayfield, president of the defendant companies, and a yellow and red label (*Defendants' Exhibit 123*) adopted instead. (Rec., 1628; 1497). But even at that the label complained of has not been shown ever to have deceived anybody, and, as it has been discarded, there is no probability that it ever will.

CLARENCE J. HOGAN, another of plaintiff's detectives:

"We have produced all the 'Koke' that was offered us as 'Coca-Cola.' You say you take it for granted that we were *not deceived* when we got it; *why, sure not.*" (Rec., 549, 650).

B. J. GILLON, another of plaintiff's detectives:

"I knew what the bottle contained before I drank the stuff, so that I was *not deceived* at any time by what I drank. In each instance where I ordered a drink and got it in a glass, and followed it up by an order of a bottle, in each such instance, *I saw it was a bottle of 'Koke'* that had been served me in the glass before I ordered it; and in each instance where I failed to order a bottle to take away with me, *I was satisfied it was 'Coca-Cola.'*" (Rec., 661-2).

GEORGE H. WILKINS:

"No, I don't believe it did look to me like 'Coca-Cola' the first time I saw it, because I was looking for 'Koke.' I knew a 'Koke' label and 'Koke' crown." (Rec., 887).

These witnesses had reference to bottles of "Koke" which they got in response to orders for "Coca-Cola," in each instance the bottles being labeled with the objectionable blue label, *Defendants' Exhibit 59 and 125*. These purchases were all made between June and September, 1913.

That these facts singularly fail to establish unfair trade by means of the “get-up” of defendants’ packages is clear.

Payton & Co., Ltd., v. Snelling, Lampard & Co., Ltd.,
17 R. P. C., 48, Lindley, M. R. (52):

“After all is said and done, what are we to consider? What is it that the plaintiffs must make out in order to entitle them to succeed in this action? They must make out that the defendants’ goods are calculated to be mistaken for the plaintiffs” and where, as in this case, the goods of the plaintiffs and the goods of the defendants unquestionably resemble each other, but where the features in which they resemble each other are common to the trade, what is the plaintiff to make out? He must make out, not that the defendants’ are like his by reason of those features which are common to him and other people, but he must make out that the defendants’ are like his by reason of something peculiar to him, and by reason of the defendants having adopted some mark or device or label or something of that kind which distinguishes the plaintiffs’ from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to this, he fails.

“It appears to me that when you once get that clearly in your mind; when you eliminate those features which are common to the trade, and ask yourself, not whether the plaintiffs’ and defendants’ things are alike, but whether the defendant has copied that which distinguishes the plaintiff’s, the conclusion must be different from that at which the learned judge arrived. ***

“The evidence is very strong that one tin may be mistaken for the other; very likely, but why? Because of the features common to them and common to all.

“That appears to me to be the short answer to this case.”

Fletcher Moulton, L. J. (55):

“Now I should like to say this with regard to cases of this class. Too often it is supposed that the trial of that issue is the same thing as trying another question; namely, whether the plaintiff has not been the first person to adopt a novel get-up; and it seems to be supposed by some that if the plaintiff establishes, in a case like this, that he is the first person to adopt what is called a new get-up, or a novel get-up, then the defendant can be restrained if the defendant, being in the same trade, adopts that novel get-up. Of course, the two questions are really quite distinct. A trader, by adopting a novel get-up, does not thereby acquire a monopoly in that get-up. Of course, it may well be that, if a plaintiff has adopted a novel get-up for his goods, that fact has to be borne in mind in considering, if the defendant adopts it, whether or not what the defendant is doing is calculated to deceive. The two questions are really distinct, and this has too often, I think, been obscured in the minds especially of trade witnesses in cases of this kind. *** There is a notion that runs through the minds of a great many persons in trades that, if a trader once adopts a novel get-up, he acquires some proprietary right in that get-up. Of course, he does not do anything of the kind. ***

Payton & Co. Ltd., v. Titus Ward & Co., Ltd., [C. A. (1899)] 17 R. P. C. 58, Lindley, M. R. (63):

“The case is not unlike a great many which we have had to consider, and there is always a little difficulty in dealing with them. The strength of the plaintiffs’ case always is that he has some get-up which he says is his. In ordinary cases, if his get-up is unlike other people’s get-up, there is really no difficulty. The only question you have then to consider is whether the defendant’s get-up is so like the plaintiff’s as to be calculated to be mistaken for it. But when, as in this case and in the last, what is called the plaintiff’s get-up consists of two totally different things combined, namely: a get-up common to the trade and a distinctive feature affixed or added to the common features, then what you have to consider is not whether the defendant’s get-up is like the plaintiff’s as regards the common features, but whether that which specially distinguishes the plaintiff’s has been taken by the defendants. A defendant may take it more or less. It is very seldom that he copies it. Of course, he does not do that, but if he so nearly takes it that, when you look at it as a whole, you can say that the defendant’s goods are calculated to be taken for the plaintiff’s goods when properly looked at,—if you can say that,—then the plaintiff is entitled to succeed. But if you cannot say that, and if the resemblance consists only in that which is common to the trade, to hold that the plaintiff is entitled to succeed, would give a monopoly of the common features. That is what the plaintiffs here, in my judgment, are trying to get, and have been trying to get, under color of their distinctive mark, if they have a distinctive

mark. They are trying to get a monopoly, not in their distinctive mark, but in those features to which they have chosen to affix it, and, under color of their distinctive mark, they are trying to extend their monopoly beyond all legal bounds. ***

“Now, what have the defendants done? *** They put on their name, and, without going so far as to say that they have done all that they could do to distinguish theirs from plaintiffs’, which is ridiculous because nobody ever does that, they have honestly endeavored not to copy the plaintiffs’ distinguishing marks. I cannot agree at all with the observations made by Mr. Justice Kekewich that the defendants have attempted fraudulently to imitate, and go as near as they can without being found out. Where I differ from him is this: I think he has minimized the importance of these features common to the trade. If you put the tins together, they do resemble each other. Of course they do more or less. Two cylindrical enameled tins resemble each other more or less. But when you come to that which distinguishes the plaintiffs’ from other peoples’, the defendants have not taken that, and have not attempted to take it, and the injunction is wholly misconceived. It appears to me that this is another attempt to obtain a monopoly far beyond that to which the plaintiffs are entitled. They have a monopoly. They have a monopoly of their own distinguishing marks; that monopoly has not been infringed by the defendants, and the appeal must be allowed, with costs here and below.”

Romer, L. J. (66, 67):

“I agree and will only add a few remarks. ***

“I agree that this case is one where the plaintiffs are attempting to acquire a monopoly of enameled tins of a kind which it is open to the trade and the public to use. I do not for a moment myself believe that the customers of the plaintiffs are likely to be deceived by the defendants’ tins,—that is to say customers who really know the distinguishing characteristics of the plaintiff’s get-up,—the characteristics which would serve to distinguish the plaintiff’s tins from enameled tins of the common size, shape and color. ***

“Much has been said on behalf of the plaintiffs about what is commonly called the unwary customer; but the only customer that the plaintiffs can really be thinking of, as it appears to me, is either one so stupid as to be wholly unable to distinguish one coffee tin from another, or one who chooses to assume that every coffee tin which is enameled and is of the same common size and shape as the plaintiffs’ tins, must of necessity be one of the plaintiffs’ tins. If you determine the question as to whether the defendants’ tins are calculated to deceive by considering customers of the kind I have just mentioned, you would be induced to hold that any tin was calculated to deceive, which only resembles the plaintiffs’ tins in matters common to the trade; in other words, you would confer on the plaintiffs’ tins a monopoly to which they are not entitled.”

This case was affirmed by the House of Lords (July 1900) 17 R. P. C., 628, 634, 636. All the Lords concurred.

Coleman & Co., Ltd. v. Stephen Smith & Co., 29 R. P. C., 81, 88, Cozen-Hardy, M. R.:

“Although I dislike quoting my own language on a point of this kind, I think I shall save time if I read a few lines from my own judgment in *Williams vs. Bronnley*, a judgment which, so far as I remember, was entirely assented to by all my colleagues: ‘What is it necessary for a trade, who is plaintiff in a passing off action, to establish? It seems to me that, in the first place, he must, in order to succeed, establish that he has selected a peculiar,—a novel,—design as a distinguishing feature of his goods, and that his goods are known in the market, and have acquired a reputation in the market, by reason of that distinguishing feature, and that, unless he establishes that, the very foundation of his case fails. If he takes a color and shape which are common to the trade, the only distinctive feature is that which he has added to the common color and common shape, and, unless he can establish that there is in the added matter such a similarity as is calculated to deceive, I think he must fail.’”

United States Tobacco Co. v. McGreenery, 144 Federal, 531, Lowell, Circuit Judge (532):

“That the packages considerably resemble each other is obvious, but most of the resemblances arise from features which have been combined in common use, and to which no one has exclusive right. That any one is deceived by the size, shape, tin foil, or general make-up of the package, by its paper, lettering, or color, does not help the complainant’s

case. All these are old separately and in combination. The complainant must show deception arising from some feature of its own, not common to the public. As was said in *Coats v. Merric Thread Co.*, 149 U. S., 562, 13 Sup. Ct., 966, 970, 37 L. Ed., 847, the purchaser of thread 'is chargeable with knowledge of the fact that any manufacturer of six cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer.' 'He [the plaintiff] must make out, not that the defendant's are like his by reason of those features which are common to them and other people, but he must make out that the defendant's are like his by reason of something peculiar to him, and by reason of the defendant having adopted some mark, or device, or label, or something of that kind, which distinguishes the plaintiff's from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to that, he fails.' *Payton v. Snelling*, 17 R. P. C., 48, 52.

"Evidence of deception is hard to deal with. Even where serious deception exists, it may be hard to prove. On the other hand, an honest prejudice easily makes deception imaginable where it does not exist. Where deception is plain and the issue concerns, not the fact of deception, but only its precise cause, the difficulty in dealing with the evidence is increased. That Thompson, Erb and Smith were deceived is plain. They thought they were buying Central Union Tobacco while buying Union Leader; but I think the mistake of the last two, like that of Thompson, arose from the color and

general appearance of the package, and little, if at all, from the word 'Union.' I find, therefore, no sufficient evidence that buyers were deceived by the defendant's use of any feature of the complainant's label which was peculiar to the plaintiff, and which the defendant had no right to use. *King v. Gillard*, 22 R. P. C., 327; *Jamieson v. Jamieson*, 15 R. P. C., 169; *Lorillard v. Peper*, 86 Fed., 956, 30 C. C. A., 496; *Continental Tobacco Co. v. Larus & Bro. Co.*, 133 Fed., 727, 66 C. C. A., 557.

"The complaint alleges not only deception, but an actual attempt to deceive. While fraud alone is not sufficient to entitle the complainant to a further comparison of the two packages, regarding each as a unit or as a combination of certain features with the ordinary red and gold wrapper, we are of the opinion that there is no sufficient similitude between them to deceive a purchaser exercising the ordinary degree of care. The decree of the Circuit Court is affirmed."

American Tobacco Co. v. Globe Tobacco Co., 193 Federal, 1015; *Diamond Match Co. v. Saginaw Match Co.*, 142 Federal, 728; *Howard Dustless Duster Co. v. Carleton*, 187 Federal, 472; *Marvel v Pearl*, 133 Federal, 160; *Globe-Wernicke Co. v. Fred Macey Co.*, 119 Federal, 703; *Stachelberg v. Ponce*, 128 U. S., 686, 32 L. Ed., 571.

Every time any of plaintiff's contentions is analyzed, it will invariably be found that what it is complaining of is not unfair competition, but any competition; that it objects to any one making and selling the commodity it makes and sells; that plaintiff's grievance is that it

thinks it is entitled to all the "dope" business, and is seeking, under a pretentious claim of property in an *idea* and dress, to maintain a monopoly in an article. What plaintiff is attempting to secure to itself is not the good will of its business,—it is the demand for an article of merchandise. Counsel seem unable or unwilling to appreciate the distinction.

In *Kellogg's Toasted Corn Flakes Co. v. Quaker Oats Co.*, 235 Federal, 657 (C. C. A.-6), it was said:

"Appellant shows that it expends vast sums in advertising its product, while defendant expends comparatively small sums for that purpose, and yet that the sales of the latter have materially increased. It is argued from this that defendant is profiting from the demand created through appellant's large expenditure. The inference thus drawn, and it is only an inference, certainly derives no support from any suggestion ever made by appellant that defendant is even a producer of the article; and the inference is subjected to a severe, if not a fatal, strain when it is considered that its effect would be to prevent another from honestly producing and selling his article unless he were prepared and willing to expend money in exploiting his product equally with his competitor. At most, then, whatever advantage defendant may derive through appellant's advertising expenditures, the advantage cannot rightfully be said to have been received through any act of fraud or unfair trade; and hence the inference might, for the sake of argument, be conceded, and still such an advantage would have to be treated purely as an incident to defendant's rightful pursuit of a lawful business,

and as an advantage voluntarily bestowed by appellant."

As the other questions in the case are purely questions of fact, they will be dealt with in the schedules.

For the reason indicated herein, it is respectfully insisted that the decree of the District Court should be reversed, and the bill dismissed.

Respectfully submitted,

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